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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,

Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION and LYNN A. MATHESON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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FOUR COUNTIES WATER USERS ASSOCIATION and LYNN A. MATHESON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Colorado River Water Conservation District and Middle Park Water Conservancy District pray that a writ of certiorari issue to review two judgments of the Supreme Court of Colorado entered January 23, 1967.

CITATIONS TO OPINIONS BELOW

The opinions of the Colorado Supreme Court are not yet reported in the official Colorado reports but are reported as *Four Counties Water Users Association v. Colorado River Conservation District*, 425 P.2d 259 and *Four Counties Water Users Association v. Middle Park Water Conservancy District*, 425 P.2d 262. Copies of these opinions and the judgments thereon are reprinted herein as Appendices A and B, respectively.

JURISDICTION

The judgments in both cases were entered on January 23, 1967. (R. 58, p. 224, 230; R. 66, p. 284, 290)[1] Timely petitions for rehearing were denied on April 10, 1967. (R. 58, p. 226; R. 66, p. 286.) By order dated June 28, 1967, Mr. Justice White extended the time for filing this petition to and including August 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a State court can reject work done by the Bureau of Reclamation as insufficient to establish a priority date for water rights for federal projects when this work would have been sufficient if done by someone other than the United States?

2. Whether the federal plan for the comprehensive development of the Upper Basin of the Colorado River, when coupled with field surveys and soil borings by the Bureau of Reclamation as one of the essential steps toward authorization of particular federal reclamation projects contemplated by an Act of Congress, establish a federal intent to appropriate water and to apply it to beneficial use?[2]

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[1] "R" refers to the record as certified to this Court by the Clerk of the Colorado Supreme Court. For convenience, the two cases are distinguished by the last two digits of the docket number before that court. Thus, R.58 refers to the record in Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, No. 21358, and R.66 refers to the record in Four Counties Water Users Ass'n. v. Middle Park Water Conservancy District, No. 21566. "App." refers to the appendices to this petition.

[2] If this petition is granted, petitioners reserve the right to argue the additional related questions of whether the decisions violate Article IX(a) of the Upper Colorado River Basin Compact of 1948 and whether the State of Colorado has bound itself to grant water rights sufficient for reclamation projects constructed under the Colorado River Storage Project Act.

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. § 391; Section 2 of the Boulder Canyon Project Adjustment Act of 1940, 54 Stat. 744, as amended, 43 U.S.C. § 618a; Sections 1, 2, and 3 of the Colorado River Storage Project Act of 1956, 70 Stat. 105, as amended, 43 U.S.C. § 620, 620a, and 620b, respectively. These are reprinted in pertinent part in Appendix C hereto.

STATEMENT

How the Federal Questions Were Raised. The judgments to which this petition relates resulted from two proceedings initiated by the petitioners in the District Courts of Colorado to establish water rights for four water storage projects to be constructed by the federal government as participating projects within the meaning of the Colorado River Storage Project Act. One proceeding involved the Wessels and Toponas projects; the other involved the Rabbit Ear and Troublesome projects. The proofs offered for each project established that the priority dates claimed were based on work performed by the Bureau of Reclamation. In each case, the District Court entered a conditional decree awarding rights with these priority dates. The Colorado Supreme Court vacated the priority dates in the conditional decrees and ordered the District Court to award priorities based on later work done by petitioners, even though this work was less extensive than that of the Bureau. The reason given for this action was that the work by the Bureau of Reclamation was insufficient to establish an intent to appropriate water. (App. A, p. A-6; App. B, pp. B-5-6.) This ground received only passing mention in the briefs of the plaintiffs in error (respondents herein) and consequently was not fully briefed by petitioners. (See R. 58, p. 212 (Br. pp. 9-10); R. 66, p. 271 (Br. p. 9).) After the Court rendered its opinions setting forth the reasons therefor, petitioners in petitions for rehearing set out in full the federal plan for the develop-

ment of the Upper Basin and raised the questions of whether the Court properly determined the federal intent and had discriminated against the United States by rejecting work which would have been sufficient to establish intention and a priority date had it been done by a private party rather than by the United States. (R. 58, p. 225; R. 66, p. 285.)

Background of the Litigation. Pursuant to Section 2 Reclamation Act of 1902, 43 U.S.C. § 411, and Section 2 Boulder Canyon Adjustment Act of 1940, 43 U.S.C., § 618a, the Bureau of Reclamation has conducted studies of potential reclamation projects in the Colorado River Basin. An established procedure is followed from initial study of such projects to final authorization of construction by Congress, and this procedure was being followed by the Bureau in connection with the projects involved in this petition.

Over a 20 year period preceding 1946, the Bureau of Reclamation investigated the potential irrigation and power sites in the Colorado River Basin. The results of these investigations were compiled into an inventory of projects and plan for comprehensive development, published in 1944 as U.S. Department of Interior, *The Colorado River: A Natural Menace Becomes a National Resource,* [hereinafter referred to as *The Colorado River (1944)*].[3] This report was subsequently further refined and republished in 1946 as U.S. Department of Interior, *The Colorado River: A Comprehensive Report on the Development of the Water Resources of the Colorado River Basin* [hereinafter referred to as *The Colorado River Basin Report (1946)*].[4] The next step toward

[3]In this report the Wessels and the Troublesome projects were referred to by their present names. Rabbit Ear was called the Muddy Creek Project and that portion of the Toponas on the Yampa River was therein called the Upper Yampa Project. For material relating to these projects see pp. 65, 74, 87, 92, 100 and 102.

[4]The project nomenclature in this report is the same as that in the previous report, *The Colorado River (1944). The Colorado River Basin Report* (1946), was again published with Federal and State Comments as H.R. Doc. No. 419, 80th Cong., 1st Sess. (1947).

federal construction of the projects included in these reports is an initial investigation called a reconnaissance survey which determines whether further planning on a particular project is feasible. Those found feasible are referred to local and State agencies which recommend a priority schedule for the more detailed feasibility investigations necessary to support a request for Congressional authorization and appropriation of construction funds. This establishment of priorities is necessary because feasibility investigation for an average project costs $200,000 - $300,000 and takes 2-3 years to complete (R. 58, pp. 162-63; R. 66, p. 190), and the Bureau, because of fund limitations, can begin only a few each year. As the projects on the priority list are reached, the necessary funds are included in the budget request submitted to Congress by the Bureau of Reclamation. (R. 66, p. 193.) On the basis of these detailed investigations, the Secretary of the Interior recommends to Congress that individual projects be authorized. (R. 66, pp. 159, 167.)

Quite obviously, a matter of primary concern in connection with any water resource development is a water right sufficient for the project. By virtue of Section 8 of the Reclamation Act, these water rights have heretofore been obtained under State law.[5] Because of the magnitude and cost of the work involved in the feasibility investigations, it is necessary to obtain these rights before that study is commenced. (R. 58, pp. 163-64; R. 66, pp. 169-70, 175.)

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[5] 43 U.S.C. § 383. Colorado, in common with other Western States, follows the doctrine of prior appropriation under which the first in time to use the water has the first right to it. *E.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). By statute water rights are evidenced by a court decree granting either an absolute right, i.e., presently used, or a conditional right, i.e., to be used in the future. In either case, the right relates back to the date the first work evidencing an intent to appropriate water was commenced. See, *e.g.*, Taussig v. Moffatt Tunnel Water and Development Co., 106 Colo. 384, 106 P.2d 363, 366 (1940).

This is normally done between the time of the initial work and the time the project is reached on the priority list.

Although the United States could obtain these water rights in its own name, it is customary for local organizations (such as the petitioners) to obtain them upon request of the Secretary of the Interior and thereafter to assign them to the United States for use in the development and operation of particular projects.[6] These organizations have in the past obtained conditional decrees with priorities relating back to the reconnaissance surveys conducted by the Bureau of Reclamation. (R. 58, p. 148.)

The Projects Involved. Two of the projects involved in this petition, Rabbit Ear and Troublesome, were specifically designated for priority of planning by Congress in Section 2 of the Colorado River Storage Project Act of 1956, 70 Stat. 106, as amended, 43 U.S.C. § 620a. Toponas and Wessels, the remaining two, fall within the contemplation of Section 3 of that Act, 70 Stat. 107 as amended, 43 U.S.C. § 620b.

The priority dates for the water rights for these projects awarded by the trial court related back to reconnaissance surveys by the Bureau of Reclamation reported in two important sub-basin studies: U.S. Department of Interior, *Cliffs-Divide Project, Colorado, Status Report* (1954) (Rabbit Ear, Troublesome and part of Toponas); and *Yampa-White Project, Colorado, Utah and Wyoming, Reconnaissance Report* (1957), (Wessels and part of Toponas), referred to hereinafter as *Cliffs-Divide Report* and *Yampa-White Report.* The work performed in connection with these surveys, further refined and developed earlier Basin development plans of 1944 and 1946, both of which specifically mentioned each of the four projects.[7] As a result

[6] Board action by petitioner Colorado River Water Conservation District and one such assignment are set forth as Appendix D hereto.

[7] A map of Colorado projects published in both reports which shows all four projects is reproduced herein as Appendix E. As stated *supra,* note 3, Rabbit Ear was called the Muddy Creek Project and that part of Toponas on the Yampa River was called the Upper Yampa Project.

of this work each project was found feasible and detailed investigation precedent to authorization by Congress was recommended.

1. *Rabbit Ear Project.*[8] The reconnaissance surveys for the project, ultimately reported in the *Cliffs-Divide Report,* pp. 43-45, consisted of land classification studies and field surveys. These studies involved preparation of base maps from aerial photographs followed by field surveys and approximately six soil borings per square mile. (R. 66, p. 182-85). The field work was conducted between September 3-16, 1950. (R. 66, p. 186.) When the land classification studies were completed, a survey of the canal systems was commenced on July 9, 1952. (R. 66, p. 176.)

The project was found feasible within reclamation criteria (R. 66, p. 167), and given a priority for feasibility investigation. (R. 66, pp. 189-90.)

The State of Colorado participated in this study by contributing funds (R. 66, p. 161.) However, the major share of the cost was borne by the United States, which has expended $22,128 on this project to date. (R. 66, p. 191.)

2. *Troublesome Project.* Field work on this project was similar to that on Rabbit Ear. Surveys and soil borings began in August, 1950. (R. 66, pp. 209-210). Survey of the canal system began on October 3, 1951. (R. 66, p. 211.) The results of these studies are contained in the *Cliffs-Divide Report,* pp. 39-42.

Troublesome was found feasible within reclamation criteria and was also assigned a priority. (R. 66, p. 212.)

The United States has expended to date $19,407 on the project. (R. 66, p. 216.)

3. *Toponas Project.* Planning for the project has been under way since the 1930's when some work was done by the WPA. (R. 58, pp. 196-97.) After World War II

[8]The name of this project is referred to correctly in the statement of claim, R. 66, p. 1, but the reporter's transcript, the trial court, and the Supreme Court incorrectly refer to it as Rabbit Ears.

work was resumed, and by August, 1951, land classification surveys and soil borings were complete. (R. 58, pp. 181-82) Survey work on the Toponas reservoir was conducted in August, 1952. (R. 58, pp. 185-86) Bureau of Reclamation findings in connection with Toponas were included in both the *Cliffs-Divide Report*, pp. 55-58, and in the *Yampa-White Report*, p. 82, since a part of the project lies in the Yampa River Basin.

Toponas was found feasible and assigned a priority. (R. 58, pp. 202-03.)

The United States has expended a total of $25,768 to date on the Toponas project. (R. 58, p. 190.)

4. *Wessels Project.* Work began in July, 1954, and consisted of land classification surveys, field surveys and soil borings, (R. 58, p. 150.) The results of this work were set out in the *Yampa-White Report*, pp. 23-28.

Wessels was found feasible and assigned a priority number. (R. 58, p. 162.)

Importance of the Water Rights Priority Dates.

In both proceedings respondent Four Counties Water Users Association filed claims proposing to divert water in large part from the same sources as the proposed reclamation projects. In earlier, though companion, decisions the Supreme Court of Colorado ordered the award of conditional decrees to Four Counties with a priority based on the commencement of field survey.[9] The Bureau of Reclamation work antedates the priority of Four Counties, and a water right based on that work would give a superior right for the reclamation projects. Due in large measure to water shortages, downstream usage, compact and treaty commitments,[10] the sup-

[9]Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, 414 P.2d 469 (1966); Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, 414 P.2d 478 (1966).

[10]*E.g.*, Boulder Canyon Project Act of 1928, 45 Stat. 1057, as amended, 43 U.S.C. §§ 617 - 617t; Colorado River Compact of 1922,

ply of water is limited; and there is insufficient water available for the reclamation projects and Four Counties' proposed diversions.

REASONS FOR GRANTING THE WRIT

I

The Decisions Threaten the Federal Reclamation Program in Colorado

The court below has held that the United States cannot have the requisite intent to appropriate water for federal projects, planned for over ten years, at very least until Congress appropriates money for a detailed feasibility investigation (the final step prior to authorization of construction), and probably not until construction is authorized. This rule will jeopardize the water rights for reclamation projects throughout Colorado either awaiting feasibility investigation, under feasibility investigation, authorized, or actually constructed under the Colorado River Storage Project Act. The Bureau of Reclamation has stated that these decisions may threaten water rights to twenty six additional federal projects, representing a total estimated federal expenditure of $920,583,288 and on which $123,661,029 has already been spent. See letter of Assistant Commission of Reclamation Stamm attached hereto as Appendix F. Nine of these projects have already been authorized,[11] and the United States may now have to condemn water rights before they can commence operation. Five others are now

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H.R. Doc. 605, 67th Cong., 4th Sess. (1923), consented to for negotiation by the Act of August 19, 1921, 42 Stat. 171, and consented to in Section 13(a) of the Boulder Canyon Project Act, 45 Stat. 1064, as amended, 43 U.S.C. § 617*l*; Upper Colorado River Basin Compact of 1948, approved by Congress April 6, 1949, 63 Stat. 31; Treaty of February 3, 1944, with Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and the Rio Grande, 59 Stat. 1219 (1945), T.S. 994.

[11] These projects are Collbran, Florida Paonia, Smith Fork, Curecanti, Silt, Bostwick Park, Fruitland Mesa and Savory-Pot Hook.

before Congress for authorization[12] of construction based on feasibility reports which presuppose water rights that might be challenged under these decisions. Those not yet authorized may prove infeasible and have to be abandoned if the United States must acquire the water rights by eminent domain, thus depriving the Colorado as well as other water users on the Colorado River of essential water storage projects. If the projects are authorized, condemnation of rights will add many hundreds of thousands of dollars to the cost, and thereby put the cost beyond the ability of the users to repay.

This threat arises because many of these projects have water rights based on reconnaisance surveys of the type the Colorado Supreme Court held insufficient in these cases. One example of an important project in immediate danger is the Juniper on the Yampa River. It has a decree based on surveys made in connection with the *Yampa-White Report*, and this decree is presently under attack by Four Counties.[13]

These decisions go to the very heart of the reclamation program in Colorado – the water rights necessary for federal projects. If they are allowed to stand, the plan established by Congress for the comprehensive development of the Upper Basin may be at least seriously delayed and at most permanently curtailed. They are, therefore, important cases which merit review by this Court.

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[12]These projects are Animas-La Plata, Dolores, West Divide, Dallas Creek, and San Miguel. The Central Arizona Project Bill (S. 1004) which passed the Senate on August 7, 1967, authorizes these projects.

[13]The Juniper Project was singled out by Congress for expeditious investigation, 43 U.S.C. § 620a. The decree granting its rights is being challenged on the same grounds urged on the State Supreme Court in the cases involved in this petition, and certainly that Court has squarely held the *Yampa-White Report* and the surveys leading thereto are insufficient evidence of an intention to appropriate and use water.

II

The Decisions Establish a Dual Standard for the Acquisition of Water Rights Which Discriminates Against the United States and Will Frustrate the Reclamation Program in Colorado

Under Colorado law a right to appropriate water may relate back to the time the first open step was taken giving notice of intent to secure it (App. A, p. A-5). The requirement of the rule and the reason for it were concisely stated in *Fruitland Irrigation Co. v. Kruemling*, 62 Colo. 160, 162 Pac. 161, 163 (1917):

> Certainly the first step demanded by the rule is nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue, and within a reasonable time, ultimately acquire a right to the use of water, and as its primary function is to give notice to those subsequently desiring to initiate similar rights, it must necessarily be of such a character that they may fairly be said to be thereby charged with at least such notice as would reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and the consequent demand upon the water supply involved.[14]

The Supreme Court of Colorado has held that the initiation of surveys constitutes a first step sufficient to acquire a priority for the right as of the date that work commenced.[15] In fact, in companion cases to the ones involved in this petition the Colorado Court concluded that the field

[14] In this case the court rejected a claim that $5.00 worth of work was sufficient evidence of the requisite intent. Language from this opinion quoted by the court (App. A, pp. A-6, A-7) must be read in the light of this fact.

[15] Taussig v. Moffat Tunnel Water and Development Co., 106 Colo. 384, 106 P.2d 363, 367 (1940); Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961).

surveys of Four Counties Water Users Association evidenced such an intention, even though the surveys were less detailed and less extensive than those conducted by the Bureau of Reclamation in these cases. *Four Counties Water Users Ass'n. v. Colorado River Water Conservation District*, 414 P.2d 469, 475 (1966); *Four Counties Water Users Ass'n. v. Colorado River Water Conservation District*, 414 P.2d 478 (1966).

The discrimination against the United States is further evidenced by the priority dates finally awarded petitioners by the Supreme Court of Colorado for these projects. Although the Court would not accept the work of the Bureau as sufficient to establish an intent to appropriate water, it awarded dates based on surveys conducted by the petitioners which were less detailed and less extensive than those conducted by the Bureau. Yet, since the federal government is to build the projects, petitioners could not have had any greater intent to appropriate water than the Bureau of Reclamation had when it made the reconnaissance surveys. It should be noted that the petitioners' evidence before the trial court concerning lands to be irrigated by these projects and water requirements therefor were taken entirely from the previous Bureau of Reclamation investigations. The only work done by the Districts were the surveys for and preparation of the map and statement filed with the State Engineer.

The work on the individual projects subsequently published in the *Cliffs-Divide Report*, and the *Yampa-White Report* gave ample notice of a fixed purpose to appropriate water for the four projects. It is crystal clear under the decisions of the Court below that this work would be sufficient had it been done by anyone other than the United States.

The result of these decisions is that non-federal interests can obtain water rights under Colorado law by performing survey work on a proposed project and thereafter diligently pursuing the proposal to completion. The United States, however, cannot acquire a water right under these decisions

until Congress appropriates funds for a detailed investigation of the project and probably not until construction is actually authorized, even though the reconnaissance surveys constitute an essential step in an established procedure by which reclamation projects are authorized.

This dual standard puts the United States in a disadvantageous position in the competition for water in short supply areas such as Colorado. Notwithstanding the fact that work performed by the United States has given notice of its intent to construct a water resource project, private parties (who may or may not be speculating on the water rights) are allowed to pre-empt the water rights necessary for it. Since federal water rights must be obtained under State law, the impact on the reclamation program is immediate, adverse, and substantial.

The Colorado Supreme Court misconstrued the purpose of the work upon which the date for the water rights were claimed and the place of this work in the federal procedure leading to the construction of these projects. Consequently, the decisions placed an intolerable burden upon the United States and those claiming under it as beneficiaries of the reclamation program.

III

The Intent To Appropriate Water Is Manifest From the Background and Scope of Planning for the Federal Development of the Upper Basin of the Colorado River

The Supreme Court of Colorado decisions ignore the vast federal activity which led to the comprehensive plan for developing the water resources of the Upper Basin embodied in the Colorado River Storage Act and the 1944 and 1946 reports leading thereto. Because of this activity the intent of the United States cannot be ascertained by the examination of isolated acts; the entire range of federal activity must be considered. When the surveys and soil classification work which support the rights claimed by petitioners are placed in

the context of this activity the error of the court below becomes readily apparent. Since the intent of the United States is what the court below undertook to determine, its decisions present a federal question cognizable by this Court.

The projects involved here had been under consideration long before the work upon which the water rights were based was performed. Planning work was commenced on these projects in the 1930's.[16] Thus the projects had been inventoried and included in development plans prior to the time the work reported in the *Cliffs-Divide Report* and *Yampa-White Report* was performed. Significantly, the *Cliffs-Divide Report* was before Congress in enacting the Colorado River Storage Project Act of 1956.[17]

The Colorado River Storage Project Act sets forth a Congressional plan for the comprehensive development of the Upper Basin which duplicates the vast development plan embodied in the Boulder Canyon Project Act of 1928.[18] Rabbit

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[16] *The Colorado River (1944)*, pp. 65, 74, 87, 92, 100, 102. See also testimony of former Commissioner Dexheimer, Hearings on S. 500 before the Subcommittee on Irrigation and Reclamation of Senate Committee on Interior & Insular Affairs, 84th Cong., 1st Sess., 16 (1955), (which bill became the Colorado River Storage Project Act of 1956):

> After some 20 years of investigations, the Bureau of Reclamation issued the Colorado River Basin Report in 1946 covering potential development of the Colorado River including over 100 irrigation and power projects in the upper basin. This report was an inventory and served as a guide for planning and compact negotiation.

[17] For data taken from this report relating specifically to Rabbit Ear and Troublesome see Hearings Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, Colorado River Storage Project, 84th Cong., 1st Sess., 155-59 (1955).

[18] A stated purpose of the statute was "to initiate the comprehensive development of the water resources of the Upper Colorado River Basin. . . ." 43 U.S.C. § 620. See also S. Rep. No. 128, 84th Cong., 1st Sess. 2 (1955); H. Rep. No. 1087, 84th Cong., 1st Sess., 3-4, 6-7

Ear and Troublesome are specifically designated for priority of planning by that Act. Toponas and Wessels are clearly within the contemplation of Section 3 of the Act.

It is clear, therefore, that the United States had formulated a plan for development of these projects before the work in question was performed. That work was not merely for information purposes, as the Court below assumed, but the last step before feasibility investigation and eventual authorization of these particular projects. In fact, it was necessarily the last federal step leading to the acquisition of water rights for the projects, since under existing procedure these rights should be firm before the expensive feasibility investigations are commenced.

The Colorado Court's insistence that the United States can intend to construct a project only if Congress has either authorized a particular project or appropriated funds for a feasibility investigation, misconceives the relationship between the Congress and the Department of the Interior in carrying out the reclamation program. Congress has delegated the responsibility for planning federal projects to the Secretary of the Interior. Congress funds the investigations of potential reclamation projects and authorizes their construction once the planning is completed by the Secretary. In ascertaining the intent of the United States, the totality of federal activity – executive and legislative – must be considered. By failing to do so, the Colorado Court has held the United States to a different and more exacting standard than private individuals who are not required to

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(1955). The vastness of the project and its cost to the United States is exemplified in U. S. Dept. of Interior *Colorado River Storage Project and Participating Projects, 10th Annual Report,* (1966). This report to Congress reflects total expenditures through the fiscal year ending June 30, 1966 on the Colorado River Storage Project Act features of $706,152,416. Of the four big storage features, Glen Canyon, Flaming Gorge, Navajo and Curecanti, the first three were substantially completed, and the fourth was well along in construction.

give notice that a project *will* be built but only that one is intended if financing, engineering, and construction plans are feasible and can be successfully completed.[19]

The Colorado Supreme Court ignored the federal activity which had preceded the work upon which the rights were based, as well as the Congressional plan for the comprehensive development of the Upper Basin, and in so doing it erroneously decided a federal question of substantial importance.[20] This Court should correct that error.

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[19]The necessity for conditional decrees prior to the time work of this magnitude is undertaken was discussed by the Supreme Court of Colorado in Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Conservation Dist., 148 Colo. 173, 194, 365 P.2d 273, 284-85 (1961):

> Passage of time and events occurring prior to granting any final decree will produce definite answers to the questions upon which the trial judge made findings based on speculative and unsupporting evidence, and used as the basis for denying any decrees. Only time can definitely determine whether all, a part, or none of the claimed water is needed. Time and work will demonstrate whether the engineering and construction plans are feasible and can be successfully completed. Time will tell whether finances can be made available. If these prerequisites to a final decree are not brought to pass within a reasonable time, the conditional decrees must be canceled or modified as only partially established.
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> * * *
>
> It is inconceivable that any development of the magnitude of that proposed by the Association involving the expenditure of more than $33,000,000 over a period of five or more years can be completed without the aid of the conditional decree statutes. Assurance of a decree on completion of a project is a prerequisite to complete financing, engineering and construction. The conditional decree statute is designed to meet the very problems confronting the Association, and it should be construed and applied so as to aid and encourage, rather than to block development and early use of the water resources of the state.

[20]The court also ignored Article IX(a) of the Upper Colorado River Basin compact of 1948, approved by Congress, 63 Stat. 31 (1949), which recognized the right of the United States to acquire rights to the use of water in the signatory states without limitation. These decisions place a severe and unreasonable restriction upon the United States in the acquisition of water rights in Colorado.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

SUPREME COURT OF THE STATE OF COLORADO

No. 21358

FOUR COUNTIES WATER
USERS ASSOCIATION,
Plaintiff in Error,

v.

JAN 23 1967

COLORADO RIVER WATER
CONSERVATION DISTRICT,
Defendant in Error

ERROR TO THE DISTRICT COURT
OF ROUTT COUNTY
HON. ADDISON M. GOODING, JUDGE

EN BANC

JUDGMENT REVERSED
WITH DIRECTIONS

Ireland, Stapleton, Pryor & Holmes
D. Monte Pasco
For Plaintiff in Error.

Frank Delaney
For Defendant in Error.

MR. JUSTICE DAY delivered the opinion of the Court.

This writ of error is directed to portions of conditional decrees for the appropriation of water entered by the district court of Routt County in a supplemental adjudication of water rights in Water District 58.

The court granted to defendant in error, Colorado River Water Conservation District (hereinafter referred to as the District) a conditional decree for what is described as the Toponas Project with the priority date in 1951 and an additional conditional decree for what was denominated as the Wessels Project, with a priority date in 1954.

There is no dispute that the district is entitled to have awarded to it the conditional decrees. Only the priority dates are challenged.

Plaintiff in error Four Counties Water Users Association (hereinafter referred to as Four Counties) objected and excepted to the priority dates awarded to the district for the reasons:

> 1. That if an appropriation of water has been initiated as of the dates claimed and awarded, the due diligence required by law from those dates up to September, 1961, had not been shown, and
>
> 2. That what was done as of the dates claimed was not intended to and did not constitute an appropriation.

The question whether due diligence was shown since the priority dates granted in the district's decrees, and the further problem whether the Bureau of Reclamation of the United States is a predecessor in title and claim of the District need not be answered in view of our resolution of the question whether there was an actual intent to appropriate as of the dates in dispute.

We find from the facts hereinafter set forth and from the law applicable thereto, there was not an appropriation by either the District or the Bureau of Reclamation as of the priority dates granted to the District.

A summary of what was done initially on both projects upon which the claims for the decrees are founded follows:

THE WESSELS PROJECT

In the record made in support of the decree for the Wessels Project it was described as one to divert water of the Yampa River for the purpose of irrigating lands along the river above Steamboat Springs. The project includes construction of a small reservoir on the Yampa River and a canal from the reservoir. In July of 1954, the Bureau of Reclamation instituted a reconnaissance investigation of the Yampa White Basin, particularly that component which

was denominated the Wessels Project. This investigation consisted, among other things, of a land classification survey to determine whether the lands which would be irrigated by the project were suitable therefor and would be benefited thereby. This reconnaissance investigation resulted in the publishing in 1957 of a Yampa White Project Reconnaissance Report issued by Region 4-B of the Bureau. As to the nature of this report and of the reconnaissance conducted three years earlier, one Mr. Jennings, Project Manager of the Bureau of Reclamation, at Grand Junction, offered uncontroverted testimony which leaves little doubt as to what was intended by the work of 1954. He testified:

> "Generally speaking, the preliminary or reconnaissance investigations are a prelude to going into this very costly feasibility type of investigation. We use those [referring to the reports of the Yampa White reconnaissance report] as a guide to indicate where there is a feasible project and if in our judgment there isn't a project in here you wouldn't schedule it for detailed investigations."

In further referring to the 1957 Yampa White Project Reconnaissance Report, Jennings testified that such report would go through channels to the Department of the Interior and Bureau of Reclamation and "would probably go to Congress *for information* purposes; *it wasn't a feasibility report* or a report *on which project authorization is made* * * * it would go *more for their information.*" (Emphasis supplied.)

Thereafter were the following questions and answers:

> "Q. And Congress would then specifically authorize the investigation after the detailed feasibility report and appropriate money for it?
>
> "A. No. The *first step* would be to appropriate monies for a *detailed* investigation.
>
> "Q. But would they have to appropriate that to the Wessels Project?
>
> "A. That is right.

"Q. To investigate it?

"A. That is right.

"Q. They have not done that to date?

"A. *They have not done that.*" (Emphasis supplied.)

After the publication of the 1957 report, the Bureau according to Mr. Jennings, *did not undertake "any specific work" in connection with the project.* The first work which would show an *intent to take* water was described by witness Philip Smith, Secretary-Engineer for the Colorado River Water Conservation District. He testified that the District "studied a revised plan on the Wessels Project with a larger reservoir at the Pleasant Valley Reservoir site, but in order to conform with the plan as more or less adopted and that the Bureau was standing by on the Wessels Project, our final filing on the project was for the Bear Reservoir. The canal system there was no change in it."

On January 23, 1962 the District filed a map and statement with the State Engineer pursuant to law. The map and statement were based upon surveys made by the District in September of 1961. There is no dispute that these surveys were such as to constitute the initiation of an appropriation, and there is further no dispute that due diligence was shown from the time of those surveys up to the date the District presented its claim in July 1962. *Four Counties Water Users Association v. Colorado River Water Conservation District,* __Colo.__, 414 P.2d 469.

THE TOPONAS PROJECT

The evidence with respect to the Toponas Project is similar. The land classification survey undertaken by the Bureau of Reclamation was commenced in August, 1951. Regarding the nature of the work that was done on the Toponas Project by the Bureau is the following testimony:

> "The initial work done in this area was done under what we call a *basin type investigation.* The purpose of that investigation was to determine *potential and feasible projects within the basin* area;

> also, to make what we call an *inventory survey* of that area, including water potential, land potential, and various other factors." (Emphasis supplied)

The Toponas Project was reported on in February, 1954, by incorporation in the "Cliff Divide Project" [Toponas unit]. It was similar to the report in which the Wessels Project was discussed. A pertinent statement in the report is the following:

> "The extent to which the planned transmountain diversion from the Yampa River Basin would conflict with the potential developments in that basin has not been determined. *This should be given further consideration* in connection with investigations of the Yampa River Basin before detailed studies of the Toponas unit are undertaken." (Emphasis supplied.)

It is undisputed that on February 26, 1963 the District commenced surveys on the project which resulted in the filing of maps and statement of claims with the State Engineer on October 4th of the same year. These surveys were the same kind and embodied the same features as the Toponas Project contemplated by the Bureau report with the exception of a change of the alignment of the Toponas canal.

It is an inexorable rule of Colorado water law that, in order to establish a right to relate back to a point of time from which the priority is to commence, there must have been on the date claimed some act *evidencing an intent to take water* and to apply it to a beneficial use. As we stated in *Rocky Mountain Power Co. v. White River Electric Assn.*, 151 Colo. 45, 376 P.2d 158:

> "* * * although an appropriation is not complete until actual diversion and use, still, the right may relate back to the time when the first open step was taken giving notice of intent to secure it."

This court has defined "an appropriation" as "the *intent to take* accompanied by some open physical demonstration of the intent and for some valuable use." (Emphasis supplied.) See *Fort Morgan Land & Canal Co. v. South Platte Ditch Co.*,

18 Colo. 1, 30 Pac. 1032; *Larimer Co. R. Co. v. People, ex rel. Luthe*, 8 Colo. 614; *McDonald v. Bear River Co.*, 13 Cal. 220.

We find from the description of the work done by the Bureau of Reclamation in the reports previously alluded to that there was no intent to take water and no physical demonstration from which such intent could be inferred so as to constitute the initial step in an appropriation.

In *Four Counties Water Users Association v. Colorado River Water Conservation District, supra*, we made the following apt statement:

> "* * * We have held that what constitutes the 'first step' is not the same in every proposed diversion because the facts must be taken into consideration in each case on an *ad hoc* basis; * * *."

Taking the facts in the case at bar, it is apparent that the Bureau made only a preliminary study "for information" undertaken along with many similar studies over virtually every water shed on the Western Slope. There was not at that time any determination as to which of the many projects would be undertaken. Many never go beyond "the feasibility study." In the Toponas and Wessels Projects almost a decade passed from the first "reconnaissance investigation of the whole basin" before the first step showing intent to appropriate was instituted.

Not every kind of survey reflects an intention to take water. As we stated in *Fruitland v. Kruemling*, 62 Colo. 160, 162 Pac. 161:

> "The grantors of the plaintiff in error did not even entertain an intent which would satisfy the law when on the 21st day of May, 1900, they visited the premises and then and there determined to initiate and ultimately perfect rights by virtue of their irrigation project. The right, as well as the intent necessary to acquire it, has its foundation in practical considerations. There is little doubt that if, upon completion of the preliminary

survey and reconnaissance, the project proved utterly impracticable and unwarranted as a business venture, the present dispute would never have arisen. Therefore, the most that can be fairly assumed is that they determined on that date to construct a reservoir and ditches, if it should prove practical and feasible to do so. This fact could only be ascertained by examining the topography of the surrounding country and verifying such observations by actual survey, and undoubtedly until this had been done, there was not, and in the very nature of things could not have been *any definite and fixed intention to proceed further.* The law does not permit an intending appropriator to invoke the benefit of remote contingencies to unduly extend the doctrine of relation." (Emphasis supplied.)

As has been stated, there is no dispute that the District surveys, followed by the filing of the maps and statements, demonstrate concretely an intention to take water and to go forward with the projects described. The dates on which such steps were taken were also not in dispute.

Accordingly, the judgment is reversed with directions to the court to modify the District's conditional decrees as of the dates such surveys were taken – in September 1961 on the Wessels Project, and in February 1963 on the Toponas Project.

MR. JUSTICE HODGES and MR. JUSTICE KELLEY not participating.

JUDGMENT IN CASE No. 21358

This cause having been brought to this court by writ of error to review the judgment of the District Court of Routt County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now

appearing to the court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause be remanded to said District Court with directions to modify the District's conditional decrees as of the dates such surveys were taken—in September 1961 on the Wessels Project, and in February 1963 on the Toponas Project.

It is further ordered that said plaintiff in error do have and recover of and from said defendant in error its costs in this court expended, to be taxed.

Appendix B

SUPREME COURT OF THE STATE OF COLORADO

No. 21566

FOUR COUNTIES WATER
USERS ASSOCIATION,
Plaintiff in Error

v.

JAN 23 1967

MIDDLE PARK WATER
CONSERVANCY DISTRICT,
COLORADO RIVER WATER
CONSERVATION DISTRICT
and LYNN A. MATHESON,
Defendants in Error

ERROR TO THE DISTRICT COURT
OF GRAND COUNTY
HON. ADDISON M. GOODING, JUDGE

EN BANC

JUDGMENTS REVERSED
AND CAUSE REMANDED

Ireland, Stapleton, Pryor & Holmes
D. Monte Pascoe
For Plaintiff in Error.

Delaney and Balcomb
For Defendants in Error Middle Park Water Conservancy District and Colorado River Water Conservation District.

J. Fred Schneider
For Defendant in Error Lynn A. Matheson.

MR. JUSTICE DAY delivered the opinion of the Court.

This writ of error is from a supplemental adjudication of water rights held by the district court of Grand County for Water District 50. Involved are conditional decrees awarded

to claimants Middle Park Water Conservancy District in cooperation with the Colorado River Water Conservation District, defendants in error. They will be referred to as Middle Park, and the District, respectively.

The challenge to the decrees relates to priority dates claimed and allowed in connection with what has been denominated as the Rabbit Ears and Troublesome Projects. The protest and objection to the Rabbit Ears decree is asserted by plaintiff in error, Four Counties Water Users Association, hereinafter referred to as Four Counties.

The controversy concerning the decree granted Middle Park and the District for the Troublesome Project affects the prior adjudicated rights of the defendant in error, Lynn A. Matheson, to whom we will refer by name. The decrees will be discussed as follows:

THE RABBIT EARS PROJECT

Middle Park made a statement of claim for water in connection with the Rabbit Ears Project and requested a priority date of August 18, 1959 based on a survey which it had undertaken as of that date with the cooperation of the District. This work resulted in the filing of a map and statement of claims for the project with the state engineer a few months thereafter. Claim was filed and an adjudication therein held November 2, 1959 resulting in a conditional decree for the project being granted as prayed for with the priority date of August 18, 1959. There is no objection to this original adjudication. Middle Park later filed an amendment to its statement of claim for this project and claimed a different and earlier date for its priority based upon reconnaissance investigation undertaken on the Rabbit Ears Project by the Bureau of Reclamation of the United States starting on September 15, 1950.

At the supplemental hearing on this amended statement, Four Counties appeared and objected and excepted to it, asserting that it would be adversely affected because of claim-

ing a priority of June 2, 1958 for the same waters as claimed by Middle Park.

After hearing held June 13, 1962 Middle Park's amended claim was allowed by the court and a new decree was awarded to it relating back to the 1950 date.

The evidence in this case relating to the initial work on the Rabbit Ears Project by the Bureau is almost identical to that shown to have been undertaken in the Wessels and Toponas Projects discussed in Supreme Court case No. 21358, announced this date. Studies made by the Bureau in 1950 were of the same nature and for the same purpose as those undertaken in the other projects and, in fact, the report on the Rabbit Ears Project was also made a part of the 1954 Cliff's Divide report discussed in case No. 21358. The nature of the Bureau's work is more fully set out in No. 21358 and is not repeated in this opinion. That case should be read in conjunction with this one.

There are other factors, however, which are asserted as making out a stronger case for relation back to the initial Bureau reconnaissance respecting the Rabbit Ears Project. These are that this particular project was specifically identified in the Upper Colorado River Storage Project Act, 43 USC § 620a, passed by the United States Congress in 1956. That legislation directed the Secretary of the Interior to give priority to the planning of the Rabbit Ears Project and to a report of such planning as well. Testimony was presented that as a result of the identification of the Rabbit Ears Project in such legislation, the Colorado Water Conservation Board had scheduled 1964 or 1965 as the time when such planning would actually begin. As has been stated, Middle Park and the District joined together in 1959 in the making of surveys of the project which resulted in the filing of maps and a statement of claim for water with the state engineer.

The only difference in the factual situation between this case and No. 21358 is that the Rabbit Ears Project was specifically named for planning in the 1956 act. The ques-

tion is whether the inclusion of the Rabbit Ears Project among those having special preference for planning evidenced an intent to appropriate different from what was shown in No. 21358. We conclude that although the interest of the United States in the development of the project might be argued to have become more definite, it still lacked the fixed purpose and intent to effect a diversion of water that would be required to initiate an actual appropriation under Colorado water law. (See discussion in case No. 21358.)

This conclusion is compelled by the testimony in the record as to the nature of the planning report to which the act directed the secretary to give priority. It follows:

> "Q. All right. I will reframe the question. Explain to the Court the nature of planning reports and what its purpose is. The planning reports, I mean, mentioned in Public Law 485.
>
> "A. Planning reports are *very little different* than the report I mentioned here (referring to surveys that had been done on the projects) except that it is done in greater detail. For instance, in a planning report it is required that land classification be performed in the field on a map drawn to scale, one inch to four hundred feet, whereas maps used in this study here are on a scale of one inch to one thousand feet. All of the studies are carried out in greater detail and to such refinement that the Bureau of Reclamation is willing to go to the Congress and recommend authorization, that they found the projects to be fully feasible and justified and that they recommend this construction.
>
> "Q. Then in the ordinary course of Reclamation procedure then is the completion of the planning report necessary before the project can be authorized?
>
> "A. It is necessary, absolutely necessary." (Emphasis supplied.)

It is clear from the above that the United States at no time had made a determination to pursue the Rabbit Ears Project with a definite intent to actually go ahead with the same and thereby appropriate the waters of this state. The first such intention manifested by anyone was that of Middle Park and the District when they commenced, on August 18, 1959, the surveys which led to the filings with the state engineer. As of the first claim and the adjudication obtained, both were of the view that that was the proper date upon which the appropriation had been initiated. The idea to claim the earlier date was an afterthought based on an erroneous premise. For the court to have awarded a priority date earlier than August 18, 1959 on the Rabbits Ears Project was erroneous.

THE TROUBLESOME PROJECT

We now turn to a discussion of the controversy in the instant case involving the Troublesome Project and the defendant in error, Lynn A. Matheson. The evidence regarding the Troublesome Project is similar to that in the Rabbit Ears Project. An August 5, 1959 priority date was originally requested by the claimants based on the commencement of survey work it had done preparatory to the filings with the state engineer. Later an amendment of the statement of claim was made and an amended decree was sought with a September 15, 1950 priority date based on the same kind of work as was done about the same time on the Rabbit Ears Project. Like the Rabbit Ears Project, the Troublesome was named for priority in connection with the completion of planning reports in the 1956 Congressional legislation, 43 USC § 620a. The statement of claimants in their answer brief pretty well sums up the evidence in the record on the Troublesome Project:

> "The history and development of the Troublesome Project is almost identical to the Rabbit Ears Project."

Our determination that this project fall squarely within the reasoning and the holding in case No. 21358 would dis-

pose of the matter except for the fact that Middle Park and the District claim right to the earlier 1950 priority date by default. Apparently no objections or exceptions were filed below to Middle Park's amended claim on the Troublesome. Matheson, who was adversely affected by Middle Park's claim thereon as amended, did not protest because of a lack of notice. There is nothing in the record to show to whom or in what manner notice was given of the amended claim, but it appears from a transcript of the record that no notice was given. Counsel for Middle Park stated to the court at one stage of the hearing:

> "The court will note that in connection with the Troublesome Project, knowing there would be no formal protest, I have not filed an amended statement of claim but rather have filed amendments of statement of claim, amending certain paragraphs * * *."

This statement was borne out by the record which shows that paragraph No. 5 of the original statement of claim was stricken and a new paragraph added giving the date of September 15, 1950, and that paragraph No. 7 of the original claim was stricken and a new paragraph substituted. Counsel, it seems, did not treat the matter as a new claim for priority and did not commence anew, giving the requisite notices to those who would be adversely affected.

We find, however, that Matheson was before the court before the conditional decrees were made a final judgment of the court. Cognizant of the fact that Matheson's position was identical with Four Counties and that the amended claim of the Troublesome Project was identical with that in the Rabbit Ears Project, and that the arguments in connection therewith were also the same, it did not reopen the matter to hear Matheson's objection but rather permitted Matheson to join Four Counties in a motion for new trial. When the motion for new trial was denied and the conditional decrees made final by the court, it was fully cognizant of Matheson's prior claim and of the objections to the Troublesome Project.

In this court, although not here as a plaintiff in error, as he probably should have been, Matheson, nevertheless, is a party to these proceedings. He was designated a defendant in error by Four Counties, even though it now appears that he is not adversely affected by Four Counties' claim and is actually in the same position as Four Counties. Matheson, as defendant in error, filed cross-error in his answer brief as to the Troublesome Project, adopting all of Four Counties' arguments.

We find that there was no appropriation sufficient to satisfy the law by the Bureau of Reclamation in 1950 on the Troublesome Project and that the correct priority date on the Troublesome Project is as originally requested, to-wit: August 5, 1959.

The judgments are reversed and the cause remanded to the trial court with directions to modify the conditional decrees by striking the priority date of September 15, 1950 and substituting therefor the date of November 2, 1959 as to the Rabbit Ears Project, and August 5, 1959 as to the Troublesome Project.

MR. JUSTICE HODGES and MR. JUSTICE KELLEY not participating.

JUDGMENT IN CASE No. 21566

This cause having been brought to this court by writ of error to review the judgment of the District Court of Grand County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause

be remanded to said District Court for further proceedings in harmony with the opinion of the court on file.

It is further ordered and adjudged that said plaintiff in error do have and recover of and from said defendants in error its costs in this court expended, to be taxed.

Appendix C

STATUTES

Section 1 of the Reclamation Act of 1902, 32 Stat. 388 as amended, 43 U.S.C. § 391,

> All moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June 30, 1901, including the surplus of fees and commissions in excess of allowances to officers designated by the Secretary of the Interior, and excepting the 5 per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and in the State of Texas, and for the payment of all other expenditures provided for in . . . [this Title].

Section 2 of the Boulder Canyon Project Adjustment Act of 1940, 54 Stat. 744 as amended, 43 U.S.C. § 618a, which provides, *inter alia*,

> All receipts from the project shall be paid into the Colorado River Dam Fund and shall be available for:
>
> * * *
>
> (d) Transfer, subject to the provisions of section 618b of this title, from the Colorado River Dam Fund to a special fund in the Treasury, established and designated the "Colorado River Development

> Fund", of the sum of $500,000 for the year of operation ending May 31, 1938, and the like sum of $500,000 for each year of operation thereafter, until and including the year of operation ending May 31, 1987 . . . . Receipts of the Colorado River Development Fund for the years of operation ending in 1938, 1939, and 1940 . . . are authorized to be appropriated only for the continuation and extension, under the direction of the Secretary, of studies and investigations by the Bureau of Reclamation for the formulation of a comprehensive plan for the utilization of waters of the Colorado River System for irrigation, electrical power, and other purposes, in the States of the upper division and the States of the lower division, including studies of quantity and quality of water and all other relevant factors. The next such receipts up to and including the receipts for the year of operation ending in 1955 are authorized to be appropriated only for the investigation and construction of projects for such utilization in and equitably distributed among the four States of the upper division . . . .

Section 1 of the Colorado River Storage Project Act of 1956, 70 Stat. 105 as amended, 43 U.S.C. § 620, provides,

> In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing

purposes, the Secretary of the Interior is authorized

(1) to construct, operate, and maintain the following initial units of the Colorado River storage project, consisting of dams, reservoirs, powerplants, transmission facilities and appurtenant works: Curecanti, Flaming Gorge, Navajo (dam and reservoir only) and Glen Canyon . . . .

(2) to construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: Central Utah (initial phase), San Juan-Chama (initial stage), Emery County, Florida, Hammond, La Barge, Lyman, Navajo Indian, Paonia (including the Minnesota unit, a dam and reservoir on Muddy Creek just above its confluence with the North Fork of the Gunnison River, and other necessary works), Pine River Extension, Seedskadee, Savery-Pot Hook, Bostwick Park, Fruitland Mesa, Silt and Smith Fork: *Provided* further, That as a part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument.

Section 2 and 3 of the Colorado River Storage Project Act of 1956, 70 Stat. 105 as amended, 43 U.S.C. §§ 620a and 620b, which respectively provide, *inter alia,*

In carrying out further investigations of projects under the Federal reclamation laws in the Upper Colorado River Basin, the Secretary shall give priority to completion of planning reports on the Gooseberry, Parshall, Troublesome, Rabbit Ear, Eagle Divide, San Miguel, West Divide, Bluestone, Battlement Mesa, Tomichi Creek, East River, Ohio Creek, Grand Mesa, Dallas Creek, Dolores, Fruit Growers Extension, Animas-La Plata, Yellow Jacket, and Sublette

participating projects.[1] Said reports shall be completed as expeditiously as funds are made available therefor and shall be submitted promptly to the affected States. . . and thereafter to the President and the Congress. . . . The preparation of detailed designs and specifications for the works proposed to be constructed in connection with projects shall be carried as far forward as the investigations thereof indicate is reasonable in the circumstances.

The Secretary, concurrently with the investigations directed by the preceding paragraph, shall also give priority to completion of a planning report on the Juniper project.

And,

It is not the intention of Congress, in authorizing only those projects designated in section 620 of this title, and in authorizing priority in planning only those additional projects designated in section 620a of this title, to limit, restrict, or otherwise interfere with such comprehensive development as will provide for the consumptive use of States of the Upper Colorado River Basin of waters, the use of which is apportioned to the Upper Colorado River Basin by the Colorado River Compact and to each State thereof by the Upper Colorado River Basin Compact, nor to preclude consideration and authorization by the

---

[1] By the Act of June 13, 1962, § 18, 76 Stat. 96, 102, the San Juna-Chama and Navajo Projects were deleted from this section and added to Section 1 of the Colorado River Storage Project Act as named participating projects authorized for construction. By the Act of September 2, 1964, 78 Stat. 852, the Savery-Pot Hook, Bostwick Park, and Fruitland Mesa Projects were deleted from this section and added to Section 1 as participating projects authorized for construction.

Congress of additional projects under the allocations in the compacts as additional needs are indicated. . . .[2]

[2] By Section 1(b) of the Act of August 16, 1962, 76 Stat. 389, 43 U.S.C. § 616(b), authorizing construction of the Frying Pan-Arkansas Project, Congress invoked the provisions of this section by adding the Basalt Project to Section 2 of the Colorado River Storage Project Act for priority of planning.

Appendix D

RESOLUTION

WHEREAS the primary function of the Colorado River Water Conservation District is the conservation of the water of the Colorado River for storage, irrigation, mining and manufacturing purposes and the construction of reservoirs, ditches and works for the purpose of irrigation and reclamation of additional lands not yet irrigated, as well as to furnish a supplemental supply of water for lands now under irrigation in the area comprehended within the boundaries of the District, and

WHEREAS, the Colorado River Storage Project and Participating Projects Act, Public Law No. 485, approved by the President of the United States on April 11, 1956, makes possible the development of the economic resources of the area within the boundaries of said District, (a) by the construction of hold-over storage reservoirs on the lower reaches of the Colorado River and its tributaries, whereby the obligations of the State of Colorado to the Lower Basin States under the 1922 Compact may be fulfilled, and (b) by the construction of head water storage and distribution facilities, by means of which beneficial use of the water of the stream may be made in that area, and

WHEREAS, it is believed to be essential, as the first step in such conservation of said water, that priorities of right to the use of the water of said stream, for all beneficial purposes within the boundaries of said District, be firmly established, and that such priorities of right be so fixed and determined that they will have seniority over any claimed right to the use of any of said water for transmountain diversion, and

WHEREAS, in taking said first step it appears to be imperative that surveys be made and maps and statements be filed in the office of the State Engineer of Colorado, of all of

said head water storage and distribution projects and facilities, commonly termed "participating projects", and that such be done in strict compliance with the statutes of the State relating thereto, and as expeditiously as is possible, and

WHEREAS, the Eagle River and its tributaries, the Roaring Fork and its tributaries, and the Gunnison River and its tributaries are most vulnerable to such transmountain or transbasin diversions as will seriously deplete the amount of water available for beneficial uses within the area included in the boundaries of the Colorado River Water Conservation District, and it appears to be essential, therefore, that said streams and their tributaries should be given first priority in survey work and the preparation and filing of maps and statements, and

WHEREAS no legal entity exists, at the present time, in the areas which include any of said last named streams within their boundaries, (with the exception of the Uncompahgre Valley Water Users Association) having either the authority under the law or the financial ability to make such filings, by reason whereof it devolves upon the Colorado River Water Conservation District to do such surveying work and to make such filings.

WHEREFORE, BE AND IT HEREBY IS RESOLVED by the Board of Directors of the Colorado River Water Conservation District as follows:

First: That the Secretary-Engineer of said District be and he is hereby authorized, empowered, directed and instructed forthwith, and as promptly and rapidly as may be, to do such engineering and survey work as may be necessary to accomplish the above purposes, and to prepare and to file in the office of the State Engineer of the State of Colorado any and all necessary or advisable maps, plats or statements, for the purpose of establishing rights to the diversion, storage and distribution of water for all beneficial purposes, by means of such diversion, distribution and storage units, projects or facilities as he shall consider necessary to accom-

plish the above objectives, or as may be specified or directed by the Executive Committee or Board of Directors of said District; and in so doing said Secretary-Engineer, Executive Committee and Board of Directors shall give full consideration to the desires of local interests.

BE IT AND IT IS FURTHER HEREBY RESOLVED That, upon the formation, in any of the above described areas, of a water conservancy district or of any other organization which shall be authorized and qualified, under the laws of the State of Colorado, and of the United States of America, to negotiate and to enter into binding contracts with the United States of America, through its Secretary of the Interior, for the construction of any such projects in connection with which such filings are made, any and all such filings, and all rights and interests of the Colorado River Water Conservation District in said filings and in the water represented thereby, upon request by any such district or entity, shall be assigned, transferred and set over unto said district or other entity, without cost to such entitites, Provided, that no transfer shall be made of such filing except for beneficial use within the boundaries of the district.

CERTIFICATE

I, Philip P. Smith, Secretary of The Colorado River Water Conservation District, do hereby certify that the above and foregoing is a true and correct copy of a resolution passed by the said Board of Directors, on the 16th day of October, A.D., 1956.

/s/ Philip P. Smith
Secretary

(Seal)

ASSIGNMENT OF WATER RIGHTS

THIS ASSIGNMENT, made this 26th day of January, 1962, by the COLORADO RIVER WATER CONSERVATION DISTRICT, organized under and by virtue of the laws of the State of Colorado, Assignor, herein styled the District, to THE UNITED STATES OF AMERICA, Department of the Interior, Assignee, herein styled the United States,

WHEREAS, the United States of America is initiating construction of the Curecanti Unit, a unit of the Colorado River Storage Project, for the purpose, among others, of stabilizing the flows of the Colorado River in order to permit the Upper Basin States to more fully utilize their allocation of the river waters, as set forth in the Upper Colorado River Basin Compact.

WHEREAS, the District has obtained conditionally decreed water rights for said Unit for the purpose of assisting in the development of said Curecanti Unit, and of making provision for development, within the District, of the water resources of the Gunnison River and its tributaries in accordance with the responsibilities of the District, provided in Chapter 149, Article 8, Colo. Rev. Stats. 1953.

NOW, THEREFORE, The District, in consideration of the sum of One Dollar and for other good and valuable consideration, does hereby assign, set over and transfer unto the United States, all of the right, title, interest, claim and priority of the District in and to the following described decrees and conditional priorities and the waters represented thereby:

Decree in the Matter of the Adjudication of Priorities for Water Rights in Water District No. 62 in the State of Colorado, Civil Action 6981, recorded in Montrose County, Colorado, March 30, 1960, in Book 27, Page 293, to-wit:

DITCH OR PROJECT NO. 282

CONDITIONAL PRIORITY NO. 445
Crystal Reservoir Storage.
CONDITIONAL PRIORITY NO. 446
Crystal Power Plant Direct Flow.
CONDITIONAL PRIORITY No. 447
Blue Mesa Reservoir Storage.
CONDITIONAL PRIORITY No. 448
Blue Mesa Power Plant Direct Flow.
CONDITIONAL PRIORITY No. 449
Morrow Point Reservoir Storage.
CONDITIONAL PRIORITY No. 450
Morrow Point Power Plant Direct Flow.

Decree in the Matter of the Adjudication of Priorities for Water Rights in Water District No. 59 in the State of Colorado, Civil Action 5590, recorded in Gunnison County, Colorado, January 27, 1961, in Judgment Book No. C, Page 317, to-wit:

THE CURECANTI UNIT

CONDITIONAL PRIORITY NO. 565
Blue Mesa Reservoir Storage.
CONDITIONAL PRIORITY NO. 566
Blue Mesa Power Plant Direct Flow.
CONDITIONAL PRIORITY NO. 567
Morrow Point Reservoir Storage.
CONDITIONAL PRIORITY NO. 568
Morrow Point Power Plant Direct Flow.

This assignment is made by the District and accepted by the United States upon the condition that the water rights assigned will be utilized for the development and operation of the Curecanti Unit in a manner consistent with the development of water resources for beneficial use in the natural basin of the Gunnison River.

IN WITNESS WHEREOF, the District has caused this Assignment to be executed the day and year first above written.

THE COLORADO RIVER WATER CONSERVATION DISTRICT

By /s/ A. Allen Brown
President

ATTEST:

/s/ Philip P. Smith
Secretary

STATE OF COLORADO,)
COUNTY OF GARFIELD.) ss.

On the 26 day of January, 1962, personally appeared before me A. Allen Brown and Philip P. Smith, who being by me duly sworn did say that they are the duly appointed, qualified and acting President and Secretary, respectively, in and for the Colorado River Water Conservation District of the State of Colorado, and that the within and foregoing instrument was signed in behalf of said District by authority of a resolution of the Board of Directors of said Colorado River Water Conservation District, and the said District executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(SEAL)

/s/ Edith B. Williams
Notary Public
Residing at Glenwood Spring, Colo.
State of Colorado

My Commission Expires:
Oct. 23, 1965.

EXPLANATION

- IRRIGATED LAND
- IRRIGABLE LAND
- RESERVOIR SITE
- MAIN CANAL LOCATION
- TUNNEL LOCATION
- POTENTIAL HYDROELECTRIC POWER PLANT
- EXISTING HYDROELECTRIC POWER PLANT
- EXISTING MAIN CANAL
- EXISTING DIVERSION TUNNEL
- BASIN DIVISION BOUNDARY.
- BOUNDARY—COLORADO RIVER BASIN
- EXISTING TRANS-MOUNTAIN DIVERSION CANAL

Scale statute miles

Modified polyconic projection
North American datum
1948

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

WATER RESOURCES DEVELOPMENT
COLORADO RIVER BASIN
COLORADO

Appendix F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY REFER TO: 430

AUG 10 1967

The Colorado River Water Conservation District
P. O. Box 282
Glenwood Springs, Colorado 81601

Gentlemen:

Pursuant to your request, I am forwarding the following data on Reclamation projects with water rights that may be threatened by the opinions of the Supreme Court of Colorado in Four Counties Water Users Association v. Colorado River Water Conservation District, 425 P. 2d 259 and Four Counties Water Users Association v. Middle Park Water Conservation District, 425 P. 2d 262.

Reconnaissance reports have been completed on the following projects:

Project	Expended To Date 6/30/67	Estimated Total Cost
Rabbit Ear	$ 22,128	$ 4,846,600
Troublesome	19,407	5,387,700
Wessels	4,507	2,488,000
Toponas	25,768	7,779,000
Subtotal	71,810	20,501,300
Juniper (Includes the Great Northern Unit)	204,529	169,601,000
Burns	12,284	2,763,000
Hayden Mesa	16,967	11,671,000
Flattops	31,782	62,300,000
Parshall	48,919	12,026,000
Eagle Divide	16,326	3,498,200
Total	$ 330,807	$261,859,200

Feasibility reports either have been or are being prepared on the following projects:

Yellow Jacket	538,561	36,325,000
Grand Mesa	527,790	36,541,000
Battlement Mesa	389,563	16,972,500

Bluestone	356,357	6,818,000
Upper Gunnison	429,309	8,899,000
Basalt	88,758	17,545,000
Dallas Creek	686,214	37,687,000
West Divide	1,010,497	99,800,000
Dolores	891,955	46,643,000
San Miguel	1,007,022	67,815,000
Animas-La Plata	929,150	109,493,000
Total	$6,855,176	$484,538,500

The following projects have been authorized for construction. The first four projects listed have been constructed, Curecanti, Silt, and Bostwick Park are under construction and advance planning preparatory to construction is in progress on Fruitland Mesa and Savery-Pot Hook.

Project	Expenditure To 6/30/67	Total Estimated Cost
Collbran	$ 15,955,376	$ 15,955,376
Florida	11,096,866	11,144,287
Paonia	7,557,389	8,097,377
Smith Fork	4,455,130	4,622,728
Curecanti	68,024,736	97,950,000
Silt	7,089,041	7,657,120
Bostwick Park	1,190,027	5,650,000
Fruitland Mesa	347,140	28,204,000
Savery-Pot Hook	831,151	15,406,000
Total	$116,546,856	$194,686,888

Sincerely yours,

G. G. Stamm

Assistant Commissioner

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Supreme Court, U.S.
FILED
OCT 18 1957
JOHN T. DEVINE, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,

Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION

and

LYNN A. MATHESON,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

J. FRED SCHNEIDER,
Attorney for Respondent
LYNN A. MATHESON
904 Majestic Building
Denver, Colorado

Denver, Colo. – SARGENT, INC. – Phone [illegible]

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SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,

Petitioners,

IN THE

v.

FOUR COUNTIES WATER USERS ASSOCIATION and LYNN A. MATHESON,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

Lynn A. Matheson requests that the writ of certiorari prayed for by petitioners be denied.

Opinions Below

The relevant opinions of the Colorado Supreme Court are correctly cited by petitioners (Petition, p.1). The texts of the opinions are contained in the Petition (Apps. A, B) and will be referred to herein.

Jurisdiction

Petitioners rely upon 28 U.S.C. §1257(3) to establish this Court's jurisdiction. As set out below in the Statement and Argument, Respondent Lynn A. Matheson believes the requirements of that statute have not been met.

Question Presented

Whether a state court's denial of a priority date for a water right claimed by a political subdivision of the state pursuant to state law presents a substantial federal question?

Statutes Involved

The statutory provisions involved are Colo. Rev. Stat. ch. 148, art. 9 and art. 10, §6 (1963), which set forth the procedure for adjudicating water rights. Respondent Lynn A. Matheson does not believe the statutes cited by petitioners are relevant.

Statement

Petitioners are political subdivisions of Colorado created pursuant to Colo. Rev. Stat., ch. 150, arts 5 and 7 (1963). They filed claims to obtain water rights for the Rabbit Ear and Troublesome water projects in November, 1959, asserting 1959 priority dates. The claims were filed in a pending water adjudication proceeding for Water District 50 in the State of Colorado. Water adjudications are held in water districts throughout the state. In these proceedings Colorado district courts are empowered to hear, adjudicate and settle "all questions concerning the priority of appropriations of water between owners and claimants of water rights drawing water from the same source within the same water district. . . ." Colo. Rev. Stat. ch. 148, art. 9, §2 (1963).

This respondent, Lynn A. Matheson, is only involved in Cause No. 21566 in the Colorado Supreme Court and there as a Defendant In Error, and was only concerned in the Troublesome Project.

On July 18, 1955, Lynn A. Matheson filed his claim for a water right in the same proceeding, claiming a priority date of May 17, 1955. Petitioner Middle Park Water Conservancy district filed its claim on November 2, 1959 claiming a priority date of August 5, 1959, petitioner asked to amend their claim and offer new and different proof, contending their appropriations were actually commenced September 15, 1950 rather than in 1959 as they had previously contended and made a verified statement of claim. The district court allowed this change and awarded a decree with a 1950 priority date. Four Counties appealed and made respondent, Lynn A. Matheson a Defendant In Error and the Colorado Supreme Court reversed, holding petitioners' priority date to be 1959, as petitioners had first claimed. *Four Counties Water Users Ass'n. v. Middle Park Water Cons. Dist.*, 425 P.2d 262 (1967). (Petition, App. B).

The United States has never appeared in any of these proceedings.

After the Colorado Supreme Court had received briefs, heard oral argument, and issued its opinions, petitioners filed motions for rehearing, raising for the first time matters argued here .The motions for rehearing were denied.

Up to the time motions for rehearing were filed with the Colorado Supreme Court, all evidence submitted and arguments made were directed to whether water rights with the claimed priority dates had been established under the provisions of Colorado's water adjudication statutes. The Colorado Supreme Court held only that the district court erred in setting priority dates. Its review of the facts in the

decision is accurate and reflects those matters relevant to the questions before it.

Argument

I.

The Colorado Supreme Court's decision is based entirely on interpretation of state law; thus, no federal question is presented.

The Colorado Supreme Court awarded petitioner priority dates as of the dates they actually commenced surveys. Commencement of work by surveys, which are used to file maps with the State Engineer, has long been the kind of work that will initiate an appropriation under Colorado Water Law. *Four Counties Water Users Assn. v. Colorado River Water Cons. Dist.* 414 P.2d 469 (1966); *Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Cons. Dist.*, 148 Colo. 173, 365 P.2d 273 (1961); *Taussig v. Moffat Tunnel Water and Dev. Co.*, 106 Colo. 384, 106 P.2d 363 (1940), and cases cited therein. Despite this well established line of authority, petitioners subpoenaed a witness from the Bureau of Reclamation who testified about certain studies performed by the Bureau. Petitioners argued this evidence entitled them to a priority date for their claimed water rights which would have been much earlier than the dates on which petitioners commenced surveys. Petitioners argued this despite the fact that before Four Counties appeared they had asserted priority dates as of their commencement of surveys.

In a reasoned opinion, grounded in well established principles of Colorado water law, the Colorado Supreme Court rejected petitioners' contentions as follows: "It is an inexorable rule of Colorado water law that, in order to establish a right to relate back to a point of time from which

the priority is to commence, there must have been on the date claimed some act *evidencing an intent to take water* and apply it to a beneficial use." *Four Counties Water Users Ass'n. v. Colorado River Cons. Dist.*, 425 P.2d 259, 261 (1967), (Petition, App. A-5). The court then cited numerous earlier Colorado Supreme Court decisions and concluded that petitioners' evidence of Bureau of Reclamation studies and reconaissance work was insufficient to initiate a priority under Colorado law.

In summary, petitioners appeared in state water adjudication proceedings and asked a state court to award them water rights which would be both granted and protected by state law. They were given water rights but with later priority dates than petitioners had sought. That is all the state court did. Thus, no "'title, right, privilege or immunity . . . . specifically set up or claimed under the Constitution, treaties or statutes of . . . the United States,' as required by 28 U.S.C. §1257(3), is involved and this Court's jurisdiction cannot be invoked. *Durley v. Mayo*, 351 U.S. 277, 281 (1956). *Williams v. Kaiser*, 323 U.S. 471, 477 (1945).

II

The Colorado Supreme Court's decisions settled controversies between citizens of Colorado; the federal government was not involved nor is one of its programs jeopardized.

Petitioners obtained rights to water for the benefit of private citizens within their boundaries, just as respondent, Lynn A. Matheson obtained a right to water for his use. This dispute has no bearing on federal policies or programs. The decisions did no more than settle where certain waters of Colorado streams would be used.

All water rights petitioners may have obtained for projects listed in Appendix F of the Petition were obtained in Colorado district court adjudication proceedings. As a

result, Colorado statutes protect these rights from later attack. After four years from entry of a decree, "all persons, associations and corporations shall be forever barred from setting up any claim to priority or rights to water for irrigation or other purposes in such water district adverse or contrary to the effect of such decree." Colo. Rev. Stat. ch. 148 art. 9, §17 (1963).

The effect of the Colorado Supreme Court decisions hardly goes beyond the decisions themselves. They settle priority dates between Colorado citizens. No other questions are presented or entities involved and no dual standard for establishing priority dates was or could be created by those decisions. The Colorado Supreme Court did no more than award petitioners the priority they had claimed and gave this respondent the priority date he claimed and proved in the adjudication proceedings.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

J. FRED SCHNEIDER
Attorney for Respondent

LYNN A. MATHESON
904 Majestic Building
Denver, Colorado 80202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,

Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION and LYNN A. MATHESON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

Four Counties Water Users Association requests that the writ of certiorari prayed for by petitioners be denied.

OPINIONS BELOW

The relevant opinions of the Colorado Supreme Court are correctly cited by petitioners (Petition, p. 1). The texts of the opinions are contained in the Petition (Apps. A, B) and will be referred to herein.

JURISDICTION

Petitioners rely upon 28 U.S.C. §1257(3) to establish this Court's jurisdiction. As set out below in the Statement

and Argument, Respondent Four Counties believes the requirements of that statute have not been met.

QUESTION PRESENTED

Whether a state court's denial of a priority date for a water right claimed by a political subdivision of the state pursuant to state law presents a substantial federal question?

STATUTES INVOLVED

The statutory provisions involved are Colo. Rev. Stat. ch. 148, art. 9 and art. 10, §6 (1963), which set forth the procedure for adjudicating water rights. Respondent Four Counties does not believe the statutes cited by petitioners are relevant.

STATEMENT

Petitioners are political subdivisions of Colorado created pursuant to Colo. Rev. Stat., ch. 150, arts. 5 and 7 (1963). They filed claims to obtain water rights for the Rabbit Ear and Troublesome water projects in November, 1959, asserting 1959 priority dates. The claims were filed in a pending water adjudication proceeding for Water District 50. Water adjudications are held in water districts throughout the state. In these proceedings Colorado district courts are empowered to hear, adjudicate and settle "all questions concerning the priority of appropriations of water between owners and claimants of water rights drawing water from the same source within the same water district . . . ." Colo. Rev. Stat. ch. 148, art. 9, §2 (1963).

In March, 1962, Four Counties filed its claim for a water right in the same proceeding, asserting a 1958 priority date. When Four Counties appeared in the proceeding, petitioners asked to amend their claims and offer new and different proof, contending their appropriations were actually commenced in 1950 rather than in 1959 as they had previously testified. The District Court allowed this change

and awarded a decree with a 1950 priority date. Four Counties appealed and the Colorado Supreme Court reversed, holding petitioners' priority date to be 1959, as petitioners had first claimed. *Four Counties Water Users Ass'n. v. Middle Park Water Cons. Dist.*, 425 P. 2d 262 (1967), (Petition, App. B).

In April, 1962, one month after petitioners had amended their claims in Water District 50, a new adjudication began in Water District 58. Both Four Counties and petitioner Colorado River Water Conservation District promptly filed claims in the Water District 58 adjudication. Four Counties again claimed a 1958 priority date. Petitioner Colorado River Water Conservation District this time claimed a 1954 priority date for the Wessels Project, although it noted surveys were commenced by it in 1961. Some months later the same petitioner filed a claim for the Toponas Project asserting a 1951 priority date, but noting it commenced surveys in 1963. The District Court gave this petitioner decrees for the earlier dates. The Colorado Supreme Court reversed and held that the dates surveys were commenced by this petitioner were the proper priority dates. *Four Counties Water Users Ass'n. v. Colorado River Water Cons. Dist.*, 425 P. 2d 259 (1967), (Petition, App. A).

The United States has never appeared in any of these proceedings and the government official who testified did so only under subpoenas issued at petitioner's request.

After the Colorado Supreme Court had received briefs, heard oral argument, and issued its opinions, petitioners filed motions for rehearing, raising for the first time matters argued here. The motions for rehearing were denied.

Up to the time motions for rehearing were filed with the Colorado Supreme Court, all evidence submitted and arguments made were directed to whether water rights with the claimed priority dates had been established under

the provisions of Colorado's water adjudication statutes. The Colorado Supreme Court held only that the District Court erred in setting priority dates. Its review of the facts in each decision is accurate and reflects those matters relevant to the questions before it.

ARGUMENT

I.

THE COLORADO SUPREME COURT'S DECISIONS ARE BASED ENTIRELY ON INTERPRETATION OF STATE LAW; THUS, NO FEDERAL QUESTION IS PRESENTED.

The Colorado Supreme Court awarded petitioners priority dates as of the dates they actually commenced surveys. Commencement of work by surveys, which are used to file maps with the State Engineer, has long been the kind of work that will initiate an appropriation under Colorado water law. *Four Counties Water Users Ass'n. v. Colorado River Water Cons. Dist.*, 414 P. 2d 469 (1966); *Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Cons. Dist.*, 148 Colo. 173, 365 P. 2d 273 (1961); *Taussig v. Moffat Tunnel Water and Dev. Co.*, 106 Colo. 384, 106 P. 2d 363 (1940), and cases cited therein. Despite this well established line of authority, petitioners subpoenaed a witness from the Bureau of Reclamation who testified about certain studies performed by the Bureau. Petitioners argued this evidence entitled them to a priority date for their claimed water rights which would have been much earlier than the dates on which petitioners commenced surveys. Petitioners argued this despite the fact that before Four Counties appeared they had asserted priority dates as of their commencement of surveys.

In a reasoned opinion, grounded in well established principles of Colorado water law, the Colorado Supreme Court rejected petitioners' contentions as follows: "It is an inexorable rule of Colorado water law that, in order to

establish a right to relate back to a point of time from which the priority is to commence, there must have been on the date claimed some act *evidencing an intent to take water* and apply it to a beneficial use." *Four Counties Water Users Ass'n. v. Colorado River Cons. Dist.*, 425 P. 2d 259, 261 (1967), (Petition, App. A-5). The court then cited numerous earlier Colorado Supreme Court decisions and concluded that petitioners' evidence of Bureau of Reclamation studies and reconaissance work was insufficient to initiate a priority under Colorado law.

In summary, petitioners appeared in state water adjudication proceedings and asked a state court to award them water rights which would be both granted and protected by state law. They were given water rights but with later priority dates than petitioners had sought. That is all the state court did. Thus, no "title, right, privilege or immunity . . . specifically set up or claimed under the Constitution, treaties or statutes of . . . the United States," as required by 28 U.S.C. 1257(3), is involved and this Court's jurisdiction cannot be invoked. *Durley v. Mayo,* 351 U.S. 277, 281 (1956); *Williams v. Kaiser,* 323 U.S. 471, 477 (1945).

II.

THE COLORADO SUPREME COURT'S DECISIONS SETTLED CONTROVERSIES BETWEEN CITIZENS OF COLORADO; THE FEDERAL GOVERNMENT WAS NOT INVOLVED NOR IS ONE OF ITS PROGRAMS JEOPARDIZED.

Petitioners obtained rights to water for the benefit of private citizens within their boundaries, just as Four Counties obtained a right to water for the use of municipalities on Colorado's eastern slope. This dispute has no bearing on federal policies or programs. The decisions did no more than settle where certain waters of Colorado streams would be used.

To Four Counties' knowledge no projects in western Colorado studied by the Bureau of Reclamation are affected by the Colorado Supreme Court's decisions except those that directly conflict with transmountain diversions of water by Four Counties or the City of Denver. Of all projects listed in a letter attached to the Petition (App. F), only Rabbit Ear, Troublesome, Wessels, Toponas, Juniper and Parshall are known to be affected. The first four are involved in this proceeding. A priority date for the fifth project, Juniper[1], is being challenged by Four Counties. A priority date for the sixth project, Parshall, is the subject of a protracted lawsuit between petitioners and the City of Denver.

All water rights petitioners may have obtained for projects listed in Appendix F of the Petition were obtained in Colorado district court adjudication proceedings. As a result, Colorado statutes protect these rights from later attack. After four years from entry of a decree, "all persons, associations and corporations shall be forever barred from setting up any claim to priority or rights to water for irrigation or other purposes in such water district adverse or contrary to the effect of such decree." Colo. Rev. Stat. ch. 148, art. 9, §17 (1963). It is believed most decrees petitioners have obtained for projects listed in Appendix F are more than four years old and so far as is known only those mentioned above are or could be under attack. Thus, only six of 30 projects listed could be affected and these are projects where the least amount of work has been done and money expended.[2]

The effect of the Colorado Supreme Court decisions

---

[1]In 1960, the Juniper project was decreed a 1959 priority date in Water District 44. Two years later, several weeks after Four Counties had filed its claims, petitioner Colorado River Water Conservation District reopened the Juniper proceeding without notice to Four Counties and changed the date to 1954. Four Counties is now exercising its right under Colo. Rev. Stat. ch. 148, art. 9, §17 (1963), to challenge petitioner's 1954 Juniper priority date.

[2]It is interesting to note that no monies have been spent on the four projects directly involved since 1962. Compare petitioners' summary of evidence in 1962 (Petition, pp. 7-8) with Petition, App. F.

hardly goes beyond the decisions themselves. They settle priority dates between two organizations who propose supplying water for Colorado citizens. No other questions are presented or entities involved and no dual standard for establishing priority dates was or could be created by those decisions. The Colorado Supreme Court did no more than award petitioners the priority they had claimed before Four Counties appeared on the scene with its proposed transmountain diversion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Clarence L. Ireland
D. Monte Pascoe
Gary W. Hart
Ireland, Stapleton, Pryor & Holmes
1700 Broadway—Suite 2017
Denver, Colorado 80202

Attorneys for Respondent
Four Counties Water Users Association

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FILED
OCT. 24 1967
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,
Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION
and
LYNN A. MATHESON,
Respondents.

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION

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Attorneys for Petitioners

October 24, 1967

Washington, D. C. · THIEL PRESS · 202 · 393-0625

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,
Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION
and
LYNN A. MATHESON,
Respondents.

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION

The substantially identical briefs in opposition filed by the two respondents attempt to minimize, but cannot evade, the grave impact of the decisions below on the water resource development program of the United States in the basin of the Colorado River within Colorado. This impact (1) is substantial and highly adverse, in derogation of the program established by Congress in the Colorado River Storage Project Act (70 Stat. 105, as amended, 43 U.S.C. § 620 – See Petition, App. C), and (2) results from improper application of a double standard for water rights which discriminates against the Federal Government.

1. **The Adverse Impact on the Federal Reclamation Program.**

The Four Counties brief (p. 6), in seeking to support its proposition that a program of the Federal Government is not jeopardized by the decisions below, concludes that:

> ". . . only six of the 30 projects listed [in Appendix F of the Petition] could be affected and these are projects where the least amount of work has been done and money expended."

Any one, let alone six (Rabbit Ear, Troublesome, Wessels, Toponas, Juniper, Parshall), is bad enough. The stake of the Government is not limited, however, to the sum of $325,000 already expended by the United States on these six projects. As shown in Appendix G attached to this Reply, at least two-thirds of the 30 projects, not just six, stand to be affected. Appendix G, similar to Appendix F of the Petition, is a letter from the U.S. Bureau of Reclamation showing the 30 projects and the dates of the conditional water decrees, if any, held on them. As will be noted, 14[1] of those having decrees have not held them long enough to be "protected" by the 1963 Colorado statute cited by Respondents[2]; three are partially so affected and could therefore

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[1] Rabbit Ear, Troublesome, Wessels, Toponas, Juniper, Burns, Flattops, Yellow Jacket, Bluestone, San Miguel, Animas-La Plata, Florida, Silt and Savery-Pot Hook. Of these projects, Florida and Silt are built and in operation; Savery-Pot Hook has been authorized by Congress and is presently under final planning; Yellow Jacket and Bluestone are in the detailed feasibility investigation stage; and San Miguel and Animas-La Plata are before Congress for authorization.

[2] Colo. Rev. Stat. Ch. 148, Art. 9 § 17 (1963). This statute has yet to be fully tested and its efficacy as "protection" is thus still problematical.

be rendered infeasible[3]; and of course the three[4] projects having no decrees as yet have no protection whatsoever if the survey and other work already done on them may not be considered by the Colorado courts in awarding conditional decrees. Accordingly, instead of "only" six projects, at least 20 could be affected. As shown in Appendix F, through June 30, 1967, the United States had spent $24,337,039 on these. The loss of these funds, however important, is not as significant as the loss of the program. Respondents concede that their interests and those of the Government in the projects involved are mutually exclusive. If the decisions below are not reversed, the federal reclamation program established by Congress for the Colorado Basin will not materialize.

2. **The Discriminatory Double Standard.**

Significantly, the opposition filed by Four Counties admits that this group is now attacking a 1954 priority date awarded the Juniper project on the basis of U.S. Bureau of Reclamation surveys. The decisions below, of course, will figure strongly in this effort. This $169,000,000 project, which includes a key reservoir to be built on the Yampa River to contain 1,710,000 acre feet of regulatory capacity,[5] was specifically mentioned in the Colorado River Storage Project Act of 1956 as follows:

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[3]This is so because on these three projects – Parshall, Dallas Creek and West Divide – only portions of the water rights needed for the projects have been awarded decrees. Both Dallas Creek and West Divide are now before Congress for authorization.

[4]Hayden Mesa, Eagle Divide and Battlement Mesa. The final feasibility study of the Bureau of Reclamation on Battlement Mesa is now being circulated among interested Federal and State agencies for comment.

[5]See Juniper Project, Colorado and Utah, Reconnaissance Report, July 1963, U.S. Bureau of Reclamation, U.S. Department of the Interior, p. 18.

> "The Secretary, concurrently with the investigations directed by the preceding paragraph, shall also give priority to completion of a planning report on the Juniper project." (See Petition, Appendix D).

As of June 30, 1967, the United States had already spent $204,529 in planning on this project. It is manifestly ridiculous, in the face of this Congressional directive and in the face of this expenditure of funds by the executive branch of the Government to find no intent by the United States to go forward with this project and to take water for it.

Both respondents agree that:

> "*Commencement of work by surveys,* which are used to file maps with the State Engineer, *has long been the kind of work that will initiate an appropriation under Colorado water law"* (citing cases; emphasis supplied). (Matheson brief, p. 4; Four Counties brief, p. 4).

Such survey work, of course, was actually commenced by the United States Bureau of Reclamation on all four of the projects involved in the 1950-1954 period. This is clear from the record as detailed in the petition for a writ of certiorari (Pet. pp. 6-8). Respondents take no exception to these facts found sufficient in the trial court for the award to petitioners, on behalf of the United States, of 1950 and 1954 priority dates which was when the surveys were accomplished. In brushing these facts aside and in awarding priorities to respondents on subsequent work far less detailed and expensive than that accomplished by the United States, the Colorado Supreme Court has established a double standard discriminating against the Federal Government. The long history of work and the enactments of Congress looking toward final accomplishment of this work – all well before the 1958 priorities awarded to respondents for totally different undertakings – clearly establish an intent to appropriate water quite at odds with the holdings below that these acts of the United States constituted ". . . no intent to take water and no physical demonstration from which

such intent could be inferred so as to constitute the initial step in an appropriation." (Petition, App. A, p. A-6); and ". . . lacked the fixed purpose and intent to effect a diversion of water. . ." (Petition, App. B, p. 4)[6]

The decisions are thus not only plainly wrong. They overlook completely the "comprehensive scheme" for the Upper Basin of the Colorado River established by the Congress in the Storage Project Act of 1956, akin to that adopted by Congress for the Lower Basin in the Boulder Canyon Project Act of 1928 and as so construed by this Court in *Arizona v. California*, 373 U.S. 546, 565 (1963). The intent of the United States under this legislation has been determined below in a manner which largely vetoes a Congressional design of major significance. The questions are cognizable by this Court and certiorari should be granted to permit their full examination.

Respectfully submitted,

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Attorneys for Petitioners

October 24, 1967

[6]Respondents direct attention to the change of claimed priority dates by petitioners for the four projects here involved and for the Juniper Project. For many years Colorado lawyers thought the Colorado map and statement Act, Colo. Rev. Stat. Ch. 148 Art. 4 § 1, required the map and statement to be filed within sixty (60) days of commencement of survey if the date of priority was to date back to the date of commencement of survey. This was forcefully urged but rejected by the Supreme Court of Colorado in *Metropolitan Suburban Water Users Assn. v. Colorado River Water Conservation District*, 148 Colo. 173, 365 P.2d 273 (1961). This decision resulted in amending the claimed dates of priority for the 4 projects here involved and for the Juniper Project.

APPENDIX "G"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO: 430

OCT 23 1967

Colorado River Water Conservation District
P. O. Box 282
Glenwood Springs, Colorado 81601

Gentlemen:

Supplementing our letter to you of August 10, 1967, we submit the following list of projects with date of decrees:

Project	Date of Entry of Decree
Rabbit Ear	9/5/64)both subject to being amended,
Troublesome	9/5/64(by decision of Colorado Supreme Court, according to Case No. 21566
Wessels	3/30/64)same as above, except according
Toponas	3/30/64(to case No. 21358
Juniper	6/22/62 Subject to being modified by Civil Action 2110, District Court of Moffat County
Burns	9/13/67
Hayden Mesa	None--adjudication pending
Flattops	District 53--9/13/67 District 43--11/21/66 District 39--11/10/66
Parshall	5/22/57 Ute Park Res. only.
Eagle Divide	None
Yellow Jacket	District 43--11/21/66 District 44--none, proof submitted
Grand Mesa	1/31/64
Battlement Mesa	None--adjudication pending.
Bluestone	11/10/66
Upper Gunnison	District 28--12/15/61 District 59--1/27/61
Basalt	6/20/58 8/3/59
Dallas Creek	4/14/61 Four reservoirs only.
West Divide	District 38--6/20/58 District 45--7/9/65 District 40--none

Project	Date of Entry of Decree
Dolores	3/22/63
San Miguel	1/16/67
Animas-LaPlata	3/21/66
Collbran	10/8/62
Florida	3/21/66
Paonia	3/20/54
Smith Fork	1/31/64
Curecanti	District 59--1/27/61 District 62--3/30/60
Silt	11/10/66
Bostwick Park	3/30/60
Fruitland Mesa	District 40--1/30/64 District 59--1/27/61
Savery-Pot Hook, Colorado	District 54--6/23/64 District 55--none.

Sincerely yours,

Maurice N. Langley

Acting Commissioner

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT, PETITIONERS

v.

FOUR COUNTIES WATER USERS ASSOCIATION AND LYNN A. MATHESON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of November 6, 1967, inviting the Solicitor General to express the views of the United States in this case.

Under the Colorado law—which follows the "prior appropriation" doctrine with respect to water rights—a court decree establishing the extent of a present right to the use of water and determining its priority over other claims may be obtained. Also, a "conditional right" may be adjudicated, whereby the priority date is established in anticipation of construc-

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tion and operation of works for appropriation of water to various uses. These four cases were brought by petitioners to establish such priorities. The trial court allowed priorities relating back to 1950. These dates were based upon investigations made by the Bureau of Reclamation of the United States Department of the Interior. The Supreme Court of Colorado reversed, holding that the activities of the Bureau of Reclamation took place under circumstances that did not reflect an intention to take water sufficient to satisfy the requirements of an initial step in an appropriation. In each case, emphasis was given to excerpts from the testimony of the Project Manager of the Bureau of Reclamation relating to the nature, purpose and effect of actions taken by the Bureau.

Since the inception of the federal reclamation program, the policy has been to execute the purpose in cooperation with local authorities and, in many details, through the medium of local irrigation districts or similar organizations. Frequently such districts secure the necessary water rights, obtain adjudications of their validity, and assign them to the United States.[1] In seeking 1950 priority dates, petitioners relied upon surveys made, and other actions taken, by the Bureau of Reclamation. The Colorado Supreme Court did not reach the question whether such actions inured to the benefit of petitioners, since it held that the requisite intent was lacking. Although the ultimate issue in these cases is

[1] Thus, no question is here presented as to the authority the United States might have to proceed without regard to the state laws of water rights. Cf. *Arizona* v. *California*, 373 U.S. 546, 588, fn. 92.

the priority date of appropriative rights under state law, the present rulings appear to have turned on the State Supreme Court's view of the limited authority of Bureau of Reclamation employees and the fact that further steps on the contemplated federal project depend upon congressional authorizations and appropriations.

This ground of decision is, in our view, unsound and prejudicial to the United States. Indeed, it appears that the physical actions here taken, if performed by agents of a non-federal irrigation district, would have been sufficient to establish priority. We do not understand that, for nonfederal appropriations, priority is held to hinge on the degree to which particular officers or employees may speak for or bind corporate directors or stockholders. Yet, here, priority rights were denied because of internal requirements of the federal government concerning detailed approval of planning and appropriation of funds. This is, we submit, an impermissible discrimination against claimants relying on Bureau of Reclamation actions.

The conditional appropriative process recognizes the importance, for purposes of planning projects and of financing them, of securing a prior right to use water. This is equally true as to economic planning of federal projects. Petitioners have detailed (Pet. 9–10, App. F 1–2) many projects, at various stages of planning or completion, that may be affected by these decisions, depending upon how they are interpreted and applied. Respondents' suggestion that statutory time limits may protect some of these projects points only to further litigation and, of course,

does not answer the problems that may be posed for other projects in the future. In the circumstances, we believe that review is warranted.[2]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.

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[2] Our submission is directed only to Question 1, presented by the Petition for Certiorari. If review is granted and that question is answered in the affirmative, a remand to the State courts for reconsideration, or for retrial, in that light may be appropriate.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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FOUR COUNTIES WATER USERS ASSOCIATION
and
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

RESPONDENT'S REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States limits its concern to the narrow question of whether the opinions of the Colorado Supreme Court discriminate against a Federal agency. The United States does not suggest that the Colorado Supreme Court's opinions finding a lack of intent to appropriate water were in error. It merely suggests that the rulings in question "appear to have turned" on the limited authority of the Federal employees performing the work and that it "appears" such work would have been acceptable to establish

priorities if performed by private persons. The United States cites no authority to support its concern and, as is shown below, nothing can be found in the opinions to give substance to the United States' concern.

As explained in earlier briefs, the right to relate an appropriation of water back to a fixed date is dependent upon the presence or absence on that date of the intent to carry out a fixed plan to divert water. *City and County of Denver v. Northern Colo. Water Cons. Dist.*, 130 Colo. 375, 388, 276 P.2d 992, 1001 (1954). In 1916 the Colorado Supreme Court declared that a finding of intent rests upon "physical acts and manifestations in pursuance of such intent" and "nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue, and, within a reasonable time, ultimately acquire a right to the use of water. . ." will initiate an appropriation. *Fruitland Irrig. Co. v. Kruemling,* 62 Colo. 160, 165, 162 P. 161, 163 (1916).

The Colorado Supreme Court has consistently followed these rules. For example, a small amount of earth moving and the purchase of lands have been held not to evidence intent. *Fruitland Irrig. Co. v. Kruemling, supra,* at 165-166. Even extensive "investigation and exploratory" work done jointly by the City of Denver and the Bureau of Reclamation has been rejected as insufficient to establish an intent to initiate an appropriation of water. *City & County of Denver v. Northern Colo. Water Cons. Dist., supra,* at 395-400. In *Denver* the Colorado River Water Conservation District (the petitioner here) successfully argued the Denver-Bureau investigation did *not* initiate an appropriation under Colorado law. Moreover, this Court in *Wyoming v. Colorado,* 259 U.S. 419, 494-495 (1922), adhered to the Colorado rule in awarding a priority for a private Colorado citizen's claim for water adverse to Wyoming.

As applied to the instant case, the rules consistently followed by the Colorado Supreme Court and adopted in *Wyoming v. Colorado* preclude holding the work done by

the Bureau of Reclamation was sufficient to initiate an appropriation. The Colorado Supreme Court found the only physical acts performed for each project consisted of spending a few days in the field, primarily for the purpose of making land classification surveys. The testimony of a Bureau of Reclamation official confirmed that this work was only investigative and exploratory. The Colorado Supreme Court noted that no further work was done after the Bureau completed a report on its investigation. Thus, the Colorado Supreme Court merely held that, at the time Bureau employees conducted reconnaissance investigations of possible project sites, the Federal Government had not determined *at any level* to construct the projects in question.

Colorado law did not operate against the United States because of the lack of authority of the persons conducting the preliminary investigations, since even the highest officials could not have initiated an appropriation on the basis of these investigations absent the requisite intent or commitment. Under Colorado law, water cannot be appropriated by drawing lines on a map or random examination of possible project locations. Commitments must be made, followed by diligent prosecution of these commitments.

The United States is wrong in asserting that a different rule would be applied to a private corporation. Given the requisite intent, any representative of the appropriator, public or private, may perform the work necessary to evidence an attempted appropriation.

In summary, the State Supreme Court did not apply a discriminatory rule against, and therefore did not prejudice the interest of, the United States. Had the State Supreme Court decided differently than it did, a discrimination in favor of the United States and against respondent would have resulted.

As to the acceptance by the United States of Petition-

er's argument that "many projects" will be adversely affected by the decisions in question, it can only be said that this is an attempt to bolster the unsound premises discussed above. Respondent has clearly set out the reasons why almost all other Federal projects are protected under state law from any adverse impact of the decisions in question (Respondent Four Counties Br. pp. 5-6). It is unclear how this statutory protection "points only to further litigation" as the United States suggests.

For the reasons given above and in Respondent Four Counties Reply Brief, we believe that review is not warranted.

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Respondents.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioners respectfully request rehearing of this Court's order of January 15, 1968 denying certiorari[1] in these cases, for the following reasons:

[1] That order was: "The petition for a writ of certiorari is denied. Mr. Justice Black and Mr. Justice Fortas are of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition." 36 U.S. Law Week 3287.

1. The need to avoid continuing litigation as illustrated by pending cases.

In characterizing the results below as ". . . unsound and prejudicial to the United States," and as constituting an "impermissible discrimination" in connection with the water decrees in issue, the Memorandum for the United States as amicus curiae notes (pp. 3-4) that respondents' (Four Counties) suggestion that statutory time limits may protect some of these projects points only to further litigation. Four Counties' reply, in referring to the so-called "four year" statute involved, finds the Government's reference to further litigation "unclear"[2]

This lack of clarity comes as a surprise in view of Four Counties' admission that they have attacked the decree for the Juniper Reservoir on the identical ground considered by the Supreme Court of Colorado in the instant cases as controlling.[3] This attack is being made under the "four year" statute, reopening the decree awarding petitioner Colorado River Water Conservation District a priority for the Juniper project based on Bureau of Reclamation sur-

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[2]Respondent's Reply to Memorandum for the United States as Amicus Curiae, p. 4.

[3]Brief for Respondent Four Counties Water Users Association in Opposition, p. 6. In its complaint in the District Court in and for the County of Moffat and State of Colorado, Civil Action No. 2110, now pending, Four Counties alleges *inter alia* that the conditional decree awarded the Juniper project with a priority of July 8, 1954 is contrary to law because:

"c. Work done by the Bureau of Reclamation may not be used to establish or continue an appropriation for the Colorado River Water Conservation District."

veys and studies culminating in the report known as the Yampa-White Project Report.[4]

The identical question here is also presented in a case pending in the Colorado Supreme Court involving the Flattops project.[5] In the Flattops case the District seeks to utilize Reclamation Bureau work of the same nature, conducted and reported upon in connection with the same Yampa-White Project Report.

As shown in the Bureau of Reclamation's letter of August 10, 1967,[6] the Juniper and Flattops projects are major undertakings having a combined estimated cost of $231,901,000. As of June 30, 1967, the United States had spent $236,311 on them. If the work represented by these expenditures made in furtherance of the Colorado River Storage Project and Participating Projects legislation ". . . amounts to no intent to take water and no physical demonstration from which such intent could be inferred. . ." as the Colorado Supreme Court held, these projects are in jeopardy.

The Reclamation Bureau letter of October 23, 1967[7] shows that many other projects are similarly in jeopardy, either because of the "four year" statute or because they presently hold no decrees.

The pending litigation involving Juniper and Flattops, with the results foreordained as a consequence of the de-

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[4]U.S. Department of Interior, *Yampa-White Project, Colorado, Utah and Wyoming, Reconnaissance Report* (1957). The holding below with regard to such reports was: "We find from the description of the work done by the Bureau of Reclamation in the reports previously alluded to that there was no intent to take water and no physical demonstration from which such intent could be inferred. . ." (See Petition, App. A, p. A-6).

[5]*Colorado River Water Conservation District v. Rocky Mountain Power Company*, Case No. 22812.

[6]Petition for Certiorari, Appendix F.

[7]Petitioner's Reply to the Briefs in Opposition, Appendix G.

cisions below on which review is now sought, makes it clear that other cases are in prospect. This situation should be avoided through a resolution of the issues by this Court now.

2. Consideration of the companion cases below illustrates the "impermissible discrimination" against the United States.

In the same trial court proceedings below in which the Districts were granted priorities based on work by the United States and on the comprehensive plan shown for the projects in activity both subsequent to and following the enactment of the Colorado River Storage Project and Participating Projects Act of 1956, the priorities sought by Four Counties for conflicting uses were denied. In rejecting Four Counties' claims the trial judge found:

> . . . That the claim here is completely speculative is clear from the record. Neither Mr. Elliot nor any of the other members of the claimant corporation intend to "use" so much as a pint of water. (R. 66, p. 53)[8]

and:

> 5. . . . the claim of [Four Counties] is speculative, not feasible, fantastic, and without reasonable promise of accomplishment. (R. 66, p. 57).

Prior to the entry of decrees for the Districts, Four Counties appealed the denial as to it to the Colorado Supreme Court resulting in separate decisions[9] in April 1966 in what

[8] As footnoted in our Petition (p. 2, fn. 1), "R" refers to the record certified to this Court from the Colorado Supreme Court. The two cases below are distinguished by the last two digits of their docket numbers below. Thus R. 66, p. 53, refers to page 53 of the record in No. 21566, *Four Counties v. Middle Park Water Conservancy District et al.*, while R. 58 citations relate to the certified record in No. 21358, *Four Counties v. Colorado River Water Conservation District.*

[9] These cases, reproduced in an Addendum hereto, are *Four Counties Water Users Association v. Colorado River Water Conservation*

were actually companion cases to those now before this Court. The variance in the results on appeal in the April 1966 cases and in the January 1967 cases on which certiorari is sought illustrates dramatically the "impermissible discrimination"[10] against the federally proposed developments.

First, with regard to whether an appropriation had been initiated. The court below quoted with approval and emphasized language from its decision in *Taussig v. Moffat Tunnel Co.*, 106 Colo. 384, 106 P.2d 363 (1940) that the first step taken toward acquiring decrees is the making of a survey of the project (414 P.2d at 475). Such a survey, the court found, had been done by Four Counties in 1958 and despite its preliminary nature as found by the trial judge, was sufficient enough to qualify for the initiation of an appropriation. How does this differ from the detailed survey, soil boring and land classification work accomplished by the Bureau of Reclamation shown in the same record below (R. 58, pp. 150, 181-82, 185-86; R. 66, pp. 151-54, 181-88, 209, 211-14)? The nature of such work cannot be distinguished.

Secondly, as to whether the project was speculative, infeasible and without promise of accomplishment. The court below said the answers to the questions in the mind of the trial judge lie in the future – that he ". . . required certainty about the future when no forthright man could make such a judgment" (414 P.2d at 476). The court then turned to its holding in *Metropolitan Suburban Water Users Association et al. v. Colorado River Water Conservation District, et al.*, 148 Colo. 173, 365 P.2d 273 (1961):

> . . . Only time can definitely determine whether all, a part, or none of the claimed water is needed. Time

District, 414 P.2d 469 (1966); *Four Counties Water Users Association v. Colorado River Water Conservation District*, 414 P.2d 478 (1966). These cases were cited without discussion in the District's Petition for Certiorari (Pet. 8, fn. 9).

[10] Memorandum for the United States as Amicus Curiae, p. 3.

> and work will demonstrate whether the engineering and construction plans are feasible and can be successfully completed. Time will tell whether finances can be made available. . . (414 P.2d at 476)[11]

In contrast, there is no question at all as to the need for the water by the projects here involved. The Yampa-White and Cliffs Divide Reports by the Bureau, which were put in evidence in the trial court proceedings, show the projected acreages to be served; the amounts of water required; the dams, reservoirs and canals necessary to divert and distribute the waters to the lands; and the method of financing the projects as participating projects under the 1956 Act.[12]

Third, as to whether changes made in Four Counties' plans indicated no fixed intentions, or abandonment. Here the court below said the dissenting opinion in *City and County of Denver v. Northern Colorado Water Conservation District*, 130 Colo. 375, 276 P.2d 992 (1954) applied to the facts, and not the language in its majority opinion. 414 P.2d at 478. The *only* use of the *Denver* case by the court below in the

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[11] The sum of some $245,000 allegedly spent by Four Counties contrasts with the more than $116,500,000 spent by the United States on those projects in Colorado shown in Appendix F to the Petition, and with over $706,000,000 spent throughout the Basin as of June 1966, in pursuance of the federal comprehensive plan under the Colorado River Storage Project and Participating Projects Act of 1956.

[12] *The Yampa-White Report* was received in evidence without objection (R. 58, pp. 118-19) as was the *Cliffs-Divide Report* (R. 66, pp. 153-54). In addition, the Secretary-Engineer of the District, who was employed by the Reclamation Bureau at the time of these Reports and who had been in charge of the work done, testified extensively with regard to them, as well as to the field work he had done as Secretary-Engineer of the District in the 1958-1961 period in reviewing the projects and in preparing maps and statements for filing with the State Engineer. This testimony pinpointed the structures to be involved, their location, capacity, the acreage to be irrigated, the costs, the benefits, financing etc. See, e.g., R. 58, pp. 98-144; R. 66, pp. 149-71, 229-36.

April 1966 rulings was of the dissenting opinion. Nevertheless, Four Counties in responding to the Solicitor General in the present cases, utilizes the majority opinion in *Denver*, which will not support the results below, as authority for the rejection of the petition for certiorari.[13] Whatever the activity of the Bureau of Reclamation may have been in the *Denver* circumstances, it was not pursuant to the comprehensive plan for the Upper Basin of the Colorado River presented to Congress in House Document No. 419, 80th Cong., 1st Sess. (1947), which culminated in the Colorado River Storage Project and Participating Projects Act of 1956. The four projects now before the Court, on the other hand, were investigated and reported upon by the Bureau in aid of and in furtherance of that plan.

Finally, the court below ruled that economic feasibility of completing the Four Counties project was not a test to be applied upon application for a conditional decree (414 P.2d at 478). While feasibility may not be required for such a decree, the fact remains that feasibility was shown with regard to the four projects now before this Court as well as the fact that they had been placed by the Bureau of Reclamation on a priority list for further work pursuant to recommendations made by a State agency, the Colorado Water Conservation Board. (R. 66, pp. 167, 212; R. 58, pp. 162, 202-203).

In this connection, as may be noted in the letter of the Bureau of Reclamation dated January 31, 1968 (attached hereto as Appendix H), the four projects involved here are

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[13] The *Denver* case does not in any event support the proposition urged in "Respondent's Reply to Memorandum for the United States Amicus Curiae", p. 2. The majority holding there concerning the Reclamation Bureau was:

". . . Denver . . . had made no effort toward financing . . . but only a laudable but fruitless attempt after nine years of inaction to induce the United States Reclamation Service to finance it . . . Meanwhile, others have worked diligently and long to put a part of this water to actual use". (276 P.2d at 1004).

carried on current Reclamation Bureau schedules for the commencement of authorizing type investigations in fiscal year 1971. It is thus clear that the projects have not been abandoned, that they are not speculative and that the trial judge in awarding the priorities sought for them while rejecting competing claims by Four Counties, fully realized the nature of the comprehensive plan including these projects established by Congress, a plan which the Colorado Supreme Court failed to comprehend.

3. The integral basin plan approved by Congress, with its essential relation between the storage units and participating projects, is vitiated by the decisions below.

There is no doubt that all participating projects constructed or to be constructed under the Colorado River Storage Project and Participating Projects Act of 1956, including the projects involved here, would be possible only if waters were stored downstream at the massive reservoirs authorized in the Act. As the Senate Report noted:

> . . . If . . . any substantial uninterrupted uses of available water are to be made by the upper division States (Colorado, New Mexico, Utah, Wyoming) . . . there must be provided a series of holdover storage reservoirs, which will assure compliance with article III (d) of the 1922 Compact and, at the same time, permit the Upper Basin States to achieve ultimate development of waters apportioned to them. . . . (S. Rept. No. 128, 84th Cong., 1st Sess. (1955), p. 3).

Congress, however, did not only authorize reservoirs. It had total ultimate development of the waters of the Upper Basin clearly in mind and provided for it in the Act. The Senate Report also makes this clear:

> 1. PURPOSE OF THE BILL
>
> S. 500, as amended, has four principal purposes. First, it would authorize a series of holdover storage reservoirs, with hydropower plants and incidental works. Second, it would authorize a number of

> consumptive use irrigation projects. Third, it would recognize, with a view to laying a foundation for eventual further action by the Congress, certain units and projects in several stages of planning, but plans for which are not sufficiently advanced to warrant final and unconditional authorization. Finally, the bill recognizes that the works authorized constitute only an initial phase of a comprehensive development of the water resources apportioned to the Upper Basin and that the specific authorizations in this bill are not intended to limit or preclude the consideration and authorization by Congress of other projects. . ." (Id. at pp. 1, 2).

Thus, the legislation authorized the Glen Canyon, Flaming Gorge, Navajo and Curecanti[14] Reservoirs, which have a combined total storage capacity of over 33,000,000 acre feet of water. With this storage available for the necessary discharges to the Lower Basin and to Mexico, development of the participating projects is possible, which development had been:

> . . . retarded while a comprehensive plan for the most efficient use of [Upper Basin] waters has been in preparation, while the investigation and selection of the best dam sites has been under way, and while engineering and economic problems have been considered. . . . (Id. at p. 2).

Budget Director Joseph M. Dodge advised the Secretary of the Interior in 1954, in commenting favorably on the Secretary's supplemental report on the Colorado River Storage Project and Participating Projects:

> *The development of irrigation* in the Upper Colorado River Basin to use the increased supply of water made available as a result of the storage project *is recognized as an integral part of the basin plan. . . (Bureau of Reclamation Project Feasibilities and Authorizations*, 1957, pp. 340-341, emphasis added).

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[14] Curecanti's authorization was conditioned upon further studies by Interior, 43 USC § 620. These were finished in 1963 and that unit of the project is now about 70% complete.

The fact that the entire plan was enacted by Congress as an integrated undertaking is further evident from the House Report:

> . . . By regulation of the flows of the rivers, these storage reservoirs benefit all the lands of the upper basin including those to be irrigated in the future. . . (H. Rept. No. 1087, 84th Cong., 2st Sess. (1955), p. 19).

From the foregoing it is abundantly clear that the irrigation projects enumerated in the Act (which include Rabbit Ear and Troublesome), and those others on which surveys and other work had been accomplished and which were included in the data before Congress (which embraces Wessels and Toponas), were definitely intended by Congress to be an "integral part of the basin plan". The huge storage now almost fully constructed is for the purpose of fulfilling these undertakings.[15] The Federal intent in this regard is unmistakable and the holdings below that there was no such intent should not be permitted to stand.

Four Counties proposes to use its decrees to take the water out of the Colorado River Basin at the sacrifice of the four irrigation projects involved here which are part of the basin plan. The result is not only a veto of the Congressional design for an interstate river system but a subversion of it in that Four Counties will be using the downstream storage at

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[15] The scope of the 1956 Act relating to the upper basin was the same as this Court described the Boulder Canyon Project Act of 1928 relating to the lower basin, in *Arizona v. California*, 373 U.S. 546, at 552 (1963):

> . . . That [Act's] meaning and scope can be better understood when the Act is set against its background – the gravity of the Southwest's water problems; the inability of local groups or individual States to deal with these enormous problems; . . . and the ultimate action by Congress at the request of the States creating a great system of dams and public works nationally built, controlled and operated for the purpose of conserving and distributing the water.

Glen Canyon and the other reservoirs in order to firm up its water diversions.

This basic error, clearly ". . . unsound and prejudicial to the United States. . ."[16] through its distortion of the Congressional plan, can only be corrected on review by this Court.

CONCLUSION

On the grounds here set forth and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that a writ of certiorari issue to the Supreme Court of Colorado.

Respectfully submitted,

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Attorneys for Petitioners

February 9, 1968

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

ROBERT L. McCARTY

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[16] Memorandum for the United States as Amicus Curiae, p. 3.

APPENDIX

APPENDIX H

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO: 710

JAN 3 1 1968

The Colorado River Water Conservation District
P. O. Box 782
Glenwood Springs, Colorado 81601

Gentlemen:

This supplements our letters to you of August 10 and October 23, 1967, and is in response to your inquiry regarding priority of feasibility investigation of proposed Federal Reclamation projects in your area upon which reconnaissance reports have been completed. As you know, the limitation in funds over the years since the passage of the Colorado River Storage Project Act has not allowed us to proceed on authorizing type investigations as rapidly as originally contemplated. The order of planning of such projects is in accordance with the request of the Colorado Water Conservation Board.

In the tabulation shown below, we have listed those projects included in our current planning program along with the schedule for the initiation of such studies. The start of the studies in future years, of course, is subject to the availability of funds and such study authorization as may be required.

Project	Initiation of Study (Fiscal Year)
Rabbit Ear	1971
Troublesome	1971
Wessels	1971
Toponas	1971
Juniper (Includes the Great Northern Unit)	1968
Hayden Mesa	1971
Parshall	1971

The Burns, Flattops, and Eagle Divide Projects are not included in our current planning program but consideration will be given to including them therein at the appropriate time and as funds permit.

As our August 10 letter indicates the other participating projects named therein have either been constructed or authorizing type investigations have been completed or are now in progress.

Sincerely yours,

G. G. Stamm

Assistant Commissioner

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FOUR COUNTIES WATER USERS ASSOCIATION, Plaintiff in Error,

v.

COLORADO RIVER WATER CONSERVATION DISTRICT and Town of Steamboat Springs, Defendants in Error.

No. 20943.

Supreme Court of Colorado.

En Banc.

April 11, 1966.

Rehearing Denied June 6, 1966.

Water adjudication proceeding. The District Court, Routt County, Addison M. Gooding, J., entered a judgment, and appeal was taken. The Supreme Court, Day, J., held that evidence adduced by water users association in water appropriation proceedings was sufficient to bring it within requirements of conditional decree statute and that water users association was entitled to an appropriation date as of time of its field survey where such was basis for filing of maps and statements with state engineer and survey extended over a period of six months, and court erred in ignoring this earlier six-month period in its finding

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that due diligence had been shown only as of certain date.

Reversed and remanded with directions.

See also Colo., 414 P.2d 478.

1. Waters and Water Courses ⇐152(2)

In proceedings pertaining to award of a conditional decree for water, only two questions are properly before the court, and their determination will dictate whether a conditional decree must follow; first is whether an appropriation has been made by the claimant and as of what date, and second is whether the claimant has prosecuted his claims of appropriation in the planning, financing and construction of his enterprise with reasonable diligence. C.R.S. '63, 148–10–6.

2. Waters and Water Courses ⇐152(8)

Evidence adduced by water users association in water appropriation proceedings was sufficient to bring it within requirements of conditional decree statute. C.R.S. '63, 148–10–6.

3. Waters and Water Courses ⇐139

Appropriation of waters for beneficial use thereof is effected as of time the first step is taken to secure it.

4. Waters and Water Courses ⇐152(8)

Evidence of the kind of actions necessary to constitute a first step taken for appropriation of water for beneficial use is not the same in every proposed diversion because facts must be taken into consideration in each case on an ad hoc basis.

5. Waters and Water Courses ⇐139

Water users association was entitled to an appropriation date as of time of its field survey where such was basis for filing of maps and statements with state engineer and survey extended over a period of six months, and court erred in ignoring this earlier six-month period in its finding that due diligence had been shown only as of certain date. C.R.S. '63, 148–10–6.

6. Waters and Water Courses ⇐152(10)

Court in ruling on claim for appropriation of water rights had no right to substitute its opinion as to course of future events for that of those charged with duty of supplying adequate water for municipali-

ties and other public bodies, as to necessity for water. C.R.S. '63, 148–10–6.

7. Waters and Water Courses ⇐133

No final decree in regard to water rights from unappropriated waters can be awarded until water is put to beneficial use, and then for only such amount as is put to use. C.R.S. '63, 148–10–8.

8. Waters and Water Courses ⇐128

Conditional decree statutes should be construed and applied to aid and encourage rather than to block development and early use of state water resources. C.R.S. '63, 148–10–8.

9. Waters and Water Courses ⇐152(3)

Court erred in water appropriation proceedings in determining that there were such changes in plan advanced by water users association as to indicate no fixed intention to take or that if there was such intention it had been abandoned. C.R.S. '63, 148–10–6, 148–10–8.

10. Waters and Water Courses ⇐132

Economic feasibility of completing a project is not a proper test to be used upon application for a conditional decree in a water appropriation proceeding. C.R.S. '63, 148–10–8.

Ireland, Stapleton, Pryor & Holmes, D. Monte Pascoe, Denver, for plaintiff in error.

Frank Delaney, Glenwood Springs, for defendant in error Colorado River Water Conservation Dist.

DAY, Justice.

The parties in this writ of error will be referred to as follows: Plaintiff in error—Four Counties Water Users Association—as Four Counties or claimant; defendants in error Colorado River Water Conservation District and the Town of Steamboat Springs as objectors.

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Four Counties expressed a desire and intention to put to beneficial use waters in Routt County and in Grand County to be diverted, through a system of exchange, to counties east of the divide. Claimant filed in the district court in each of the counties its Statement of Claims, asserting that appropriations had been made and due diligence demonstrated commencing on and continuously from June 2, 1958. Claimant prayed for the entry by the court of a conditional decree fixing and determining the priority rights of the appropriation of the water claims and establishing the date from which reasonable diligence had been shown to have been exercised and fixing the maximum amount of water which the claimant shall be entitled to divert under the aforementioned priority.

The claims in both of the counties were interrelated and constituted an integral collection storage and diversion system. Both counties are within the Fourteenth Judicial District, and it was therefore stipulated by the parties that the testimony introduced at the hearing in the district court of Grand County and the testimony given in the adjudication proceedings in Routt County would be considered together by the court.

Identical orders, denominated "Findings and Conclusions," were entered by the court in each of the cases denying claimants their request for a conditional decree. To those orders writ of error issued in this case and in the companion case Colo., 414 P.2d 478. This opinion must be read in

conjunction with the opinion in that case announced this date, as both cases were consolidated for oral argument; and it was agreed that the decision in this case is dispositive of questions raised in the other.

By its Statement of Claims and the evidence presented at the hearings in support thereof, Four Counties seeks to appropriate water from Walton and Fish Creeks in Water District 58 and on Muddy Creek and its tributary in Water District 50—all in the Yampa River Water shed. The plans include storage for these waters in a reservoir on Rabbit Ears Pass. From there, at the first stage of the proceeding, a portion of the water collected would be delivered to Grizzly Creek, a tributary of the North Platte River arising in the northwest corner of North Park. By exchange an equal amount of water would be taken from the Illinois and Michigan Rivers, arising in the northeast corner of North Park and delivered by ditch to Willow Creek Pass. The remainder of the water is contemplated to be transported to Willow Creek Pass by pipe line or channel, and then to Granby Reservoir by use of the Colorado Big Thompson Conservation facilities on Willow Creek. The waters would then be transported via the Adams Tunnel to the Eastern Slope for water users in the counties of Adams, Boulder, Weld and Larimer.

Absent the requisite consent and agreement from the federal government for the use of the Adams Tunnel, the plans call for an extension of the Fourth of July Mine Tunnel on Arapahoe Pass and tranportation and storage on the Eastern Slope.

Objections were filed in Grand County in the adjudication proceedings there by the Middle Park Water Conservancy District in which the Colorado River Water Conservation District joined. The Town of Steamboat Springs and the Colorado River Water Conservation District joined in filing the protest and objections in the adjudication proceedings in Routt County. The protests filed by all of the objectors are identical, and the court, in denying the conditional decree in both proceedings, adopted in toto all of the points and all of the arguments raised by the objectors to the granting of the decree.

In entering its order, the court first announced a general observation which formed the background for and provided the dominant theme in more specific findings. The court said:

> "Claimant at the outset of its reply brief offers the idea that 'claimant wants to first emphasize * * * that entry of a conditional decree is mandatory upon showing an appropriation has been initiated and has been pursued with diligence.'

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This has the merit of [illegible]vity but its sweeping consequences [illegible] is adopted should have some place [illegible]e consideration. In this constricted framework, need and necessity for and amount of the water are irrelevant. The claimant need only claim. It imports that a claimant is empowered to segregate and place beyond the reach of others who may be in dire need of the water, an amount and volume limited only by the notions of the claimant and for an indefinite period, whether the claimant be a speculator, an entrepreneur or a self-styled 'water users association'. That the claim here is completely speculative is clear from the record. Neither Mr. Elliott nor any of the other members of the claimant corporation

intend to 'use' so much as a pint of water. The sole intention is to hold and control the water and sell it to various areas and municipalities none of whom are obliged to purchase any part of it and whether any of them will meet the claimant's terms and requirements when and if they need and desire the water is unknown."

The court recited the details of the project as shown by various maps, plans and filings in the office of the State Engineer. (They are not necessary for purposes of this opinion to be recited in detail here.) The court then found:

"The scheme variously referred to as the Four Counties Project and as the Rabbit Ears Project, as a whole, consists of many separate units and is not one project."

Other findings—eight in number—were as follows:

"2. The claimant has not arrived at any definite intention to divert or appropriate water for any given beneficial purpose or use. The claimant does assert that the water mentioned in the claim and which it proposes to appropriate is for municipal purposes, but whether such water is needed or will be used by the municipalities or organizations for which the claim is made is purely speculative and conjectural.

"3. The details of the structures necessary to divert or appropriate water have not been formulated or crystalized to the extent necessary to constitute the first part of an appropriation; namely, a definite intention to divert a maximum amount of water or to determine how such water is to be diverted.

"4. To the extent that the claimant had any plan or intention to appropriate water, such intention was indicated by the reconnaissance surveys, which, even up to the time of the hearing herein, were being radically changed and modified so as to constitute an abandonment of the earlier tentative plans, and successive changes to other structures and features were being made which constituted a material departure from the earlier proposals.

"5. That the claim of said Association is speculative, not feasible, fantastic, and without reasonable promise of accomplishment.

"6. Such a claim of appropriation if merged into a conditional decree will recognize expressly or by necessary implication as due diligence in the continuance of said decree reconnaissance surveys and exploratory work of the same kind as said claimant relies on as the steps necessary to initiate and constitute an appropriation. The result would be earmarking water for speculative purposes. As to other bona fide appropriators on the streams, the right to appropriate water would be so clouded that the further appropriation of the waters of the streams involved would be made impossible.

"7. The claims of the said Four Counties Association are insufficient and should be denied for the following reasons:

(a) There is no sufficient evidence to show that water exported to the tributaries of the North Platte River will not be used in whole or in part outside of the State of Colorado. The evidence does not show that after said water is diverted into the tributaries of the North Platte River that the same will be so controlled that said water, or a corresponding amount of water, may be used in the State of Colorado.

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(b) The evidence is insufficient to show that the claimant can acquire the right to divert and utilize water through the Adams Tunnel, or by means of other facilities of the Colorado-Big Thompson Project.

(c) The undisputed evidence shows that the cost of water to be conveyed through the proposed work and project, if otherwise physically or legally possible, would be so expensive as to be impossible of accomplishment.

(d) The claimant has shown no plan or intention whereby Highway No. 40, which now extends through the proposed site of Rabbit Ears Reservoir, is to be or can be re-routed.

(e) No definite intentions or plans have been formulated as to the manner in which any water which the claimant proposes to export from the tributaries of the North Platte to the tributaries of the Colorado River Basin or from any other source to Willow Creek, a tributary of the Colorado River, is to be transported or conveyed to the Granby Reservoir.

"8. It appears that the claims in Water District No. 50 are limited to two headgates on Muddy Creek and that the Rabbit Ears Reservoir is an on-stream reservoir on Muddy Creek itself. Except for this the claims are in District No. 58. There are also claims, said to be a part of the projects of the claimant, or one or more of them, in Water District No. 51, but there is nothing now before the Court for adjudication in Water District No. 51.

"9. Subject to the foregoing and for whatever purpose it may serve, and to conform to the possible implications contained in the Metropolitan case the Court finds that claimant has been diligent since Jauary 26th, 1959. This is on the assumption that claimant has initiated

To the findings of the court, Four Counties filed detailed and specific objections; and upon the overruling of those objections and the entry of the judgment denying the conditional decree, they prosecuted this writ of error.

The findings of the trial court are challenged specifically, but each of them need not be analyzed in this opinion. In summary, it is asserted that they are either not supported by the evidence or are contrary to undisputed evidence. It is also argued that the court refused to apply the law announced by this court in Metropolitan Suburban Water Users Association, et al. v. Colorado River Water Conservation District, et al., 148 Colo. 173, 365 P.2d 273, to the facts in this case. Here, as in that case, is involved the application of C.R.S. 1963, 148-10-6 to facts clearly similar. The section reads:

"Proof of claim—decree.—(1) Each claimant for appropriation of water within said water district, whether said appropriation shall have been wholly or partially completed, and though no filing shall have been made in the office of the state engineer, shall appear at said general adjudication proceedings and file his statement of claim and offer proof in support thereof before the district court, or the referee appointed for such purpose, and claims and proofs with respect to partially completed or perfected appropriations shall be presented in the same manner as the claims and proofs for completed and perfected appropriations.

(2) The court and referee shall receive and consider all such claims and proofs and if it shall appear that any claimant at said proceedings, or his predecessors in title and claim, has prosecuted his claims and appropriation and the financing and construction of his enterprise with reasonable diligence under all the facts and circumstances surrounding and bearing upon such claim of appropriation,

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the district court shall enter a decree fixing and determining the priority of right of each such partially completed appropriated as of the date from which such reasonable diligence shall be shown to have been exercised, and fixing the maximum amount of water which such claimant shall be entitled to divert under said priority for the purpose of perfecting his said appropriation. The court, or the referee, shall further condition such priority of right upon the application of water to beneficial use within a reasonable time after date of the entry of said decree with provision that final decree shall be thereafter entered for such amount of water as shall be shown in a subsequent proceeding to have been applied to beneficial use with reasonable diligence, and that the amount of water so to be thereafter finally decreed to such appropriation shall in no event be in excess of the maximum amount so fixed in said conditional decree.

(3) The court, or the referee, shall give to each such conditional decree the number of its priority like as for a completed appropriation awarded in said adjudication proceedings, but with a letter or suffix following such number to distinguish it as a conditional decree."

First Question To Be Determined:

DID FOUR COUNTIES PRESENT SUFFICIENT EVIDENCE TO BRING IT WITHIN THE REQUIREMENTS OF THE "CONDITIONAL DECREE" STATUTE ABOVE QUOTED?

This question is answered in the affirmative.

The trial court characterizes this statute as "replete with ambiguities and uncertainties" and further observed that "until these have been resolved by authoritative judicial interpretation the supported control of the court over the conditional decree (itself an accomplished fact) [sic] is very tenuous."

The statute for application for a conditional decree is not ambiguous. And when read with C.R.S. 1963, 148-10-8, as we said in *Metropolitan Suburban Water Users Association*, supra, the latter section provides "* * * ample safeguards" for the future. It reads in pertinent part as follows:

"The day of the opening of the first term of said district court in every even numbered year after the year of entry of said decree in said general adjudication proceeding shall be adjudication day for the hearing of further proof in support of any appropriation so granted conditional decree in said general adjudication and for the purpose of permitting such claimant to show reasonable diligence in the prosecution of the completion of said appropriation, * * *. At the conclusion of such hearings * * * *the district court shall cancel in whole or in part the conditional decrees of all claims for appropriation where, under all the facts and circumstances concern-*

ing each enterprise, reasonable diligence or progress has not been shown in the financing, construction and completion in whole or in part of each of the several enterprises theretofore granted such conditional decree; and by order shall continue until the next succeeding adjudication day all conditional decrees or portions thereof not so canceled with respect to which appropriations in whole or in part reasonable diligence and progress has been shown, and shall enter final decrees for all conditional appropriations or make final any portion thereof where beneficial use of water has been made since the last hearing upon such claim, but in no event to exceed the amount so applied to beneficial use nor the maximum amount fixed by the conditional decree in each instance." (Emphasis supplied.)

[1, 2] Applying section 148-10-6, it is clear that in proceedings pertaining to an award of a conditional decree for water, only two questions are properly before the

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court, and their determination will dictate whether a conditional decree must follow. One is whether an appropriation has been made by the claimant and as of what date. The second is whether the claimant has prosecuted his claim of appropriation and the planning, financing and construction of his enterprise with reasonable diligence. In the case at bar claimant is in the anomalous position of having the court find that there was due diligence from the date of January 26, 1959 (although the correctness of that date is challenged) but that there was no appropriation. Left unanswered by the court was what Four Counties had been duly diligent about.

Second Question To Be Determined:

WAS AN APPROPRIATION INITIATED BY FOUR COUNTIES?

This question is answered in the affirmative.

[3, 4] An appropriation of water for beneficial use thereof is effected as of the time the "first step" is taken to secure it. Sieber v. Frink, 7 Colo. 148, 2 P. 901. We have held that what constitutes the "first step" is not the same in every proposed diversion because the facts must be taken into consideration in each case on an *ad hoc* basis; although projects of the scope of Four Counties have been before this court in previous years. For example, in Taussig v. Moffat Tunnel, etc., Co., 106 Colo. 384, 106 P.2d 363, we affirmed the granting of conditional decrees on the basis that appropriations were effected by the conducting of surveys in pursuance of a plan to bring water from the Western Slope to the South Platte Basin on the East Slope. In that case we said:

"* * * All the facts and circumstances surrounding these claims indicate an enterprise of considerable magnitude. Only under the circumstances before us would it be possible for private enterprise to bring water from the Western Slope to the South Platte basin on the Eastern Slope. Until there is a reasonable assurance culminating in conditional decrees, such as are before us, it would not be possible for any private enterprise to risk such a large amount of capital as is necessary to complete the same. * * * *The first step taken in the instant case toward acquiring decrees was the making of a survey of the project,* which is not an unusual practice. * * *" (Emphasis supplied.)

[5] Thus it is clear that Four Counties was entitled to an appropriation date as of the time of its field survey. The trial court characterized these as merely reconnaissance surveys and being preliminary in nature. However, we find from the record that they were, in fact, the basis for filing of maps and statements with the State Engineer: the first within three months time —in September—and the others the following January, a total of six months for surveys and detailed maps. A survey of such depth as to be the basis for detailed maps is one that we have said can be used as the date of the initiation of the appropriation. As we said in *Metropolitan Suburban Water Users Association*, supra:

"The District commenced work on its Red Cliff Project by survey on August 10, 1956, and on October 4, 1956, filed with the state engineer its map and statement in conformity with the provisions of CRS '53, 147-4-1.

"Counsel for the District vigorously and persuasively argue that, having strictly complied with the Map and Statement Act, CRS '53, 147-4-1, it is entitled to the benefit of the doctrine of relation of its priority date back to the date it commenced its survey. *We subscribe to this contention providing there has been due diligence as required by* CRS '53, 147-10-6, supra. (Now C.R.S. 1963, 148-10-6)." (Emphasis supplied.)

This evidence of survey work commenced in June, 1958, followed by preparation and filing of maps and statements as early as September, 1958, also constitutes due diligence since the initial survey. It was error for the court to ignore this earlier six-month period in its finding that due diligence had been shown only since January 26, 1959.

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Third Question To Be Determined:

DOES THE EVIDENCE SUPPORT THE COURT FINDING THAT THERE WAS NO NEED FOR THE WATER; THAT THE SHOWING OF NEED WAS AT MOST SPECULATIVE, AND THAT THE PROJECT WAS "NOT FEASIBLE, WAS FANTASTIC AND WITHOUT REASONABLE PROMISE OF ACCOMPLISHMENT." ?

This question is answered in the negative.

[6,7] The finding of the trial court in this regard was, at most, only an opinion and not a finding of fact. The answers to most of the questions in the mind of the trial court lie in the future. The court applied yardsticks outside those set forth in the *Metropolitan* case; and, if the trial court's reasoning was to apply, there would be required certainty about the future when no forthright man could make such a judgment. The court, in effect, required proof of future needs for water with certainty at the time of the application for the conditional decree; and further required that no changes be made in the project once commenced; and that detailed planning for every phase of the multi-million dollar project be completed. The court, in effect, required proof with certainty that the project would be constructed, and that the construction would be financially feasible As we said in *Metropolitan*, supra:

"Similar views and fears prevailed with reference to the Big Thompson,

Moffat Tunnel, Roberts Tunnel and other major projects—to many if not to most people, these projects appeared to be the dreams of visionaries; today they are beneficent realities. The trial court had no right to substitute its opinion as to the course of future events, for that of those charged with the duty of supplying adequate water for municipalities and other public bodies, who have made careful studies of the questions and problems presented and have in good faith put their *vision, work, money and energies* into a program by which they seek to put the public waters of the state to beneficial use. If they have miscalculated and fail, the loss is theirs—if they succeed, it will be for the eternal benefit of the peoples of the state of Colorado."

We further commented on similar findings of the trial court in the *Metropolitan* case as follows:

"Passage of time and events occurring prior to granting any final decree will produce definite answers to the questions upon which the trial judge made findings based on speculative and unsupporting evidence, and used as the basis for denying any decrees. Only time can definitely determine whether all, a part, or none of the claimed water is needed. Time and work will demonstrate whether the engineering and construction plans are feasible and can be successfully completed. Time will tell whether finances can be made available. If these prerequisites to a final decree are not brought to pass within a reasonable time, the conditional decrees must be cancelled or modified as only partially established.

"No final decree can be awarded until the water is put to beneficial use, and then only for such amount as is put to such use.

"It is inconceivable that any development of the magnitude of that proposed by the Association * * * can be completed without the aid of the conditional decree statutes. Assurance of a decree on completion of a project is a prerequisite to complete financing, engineering and construction. * * *"

The evidence at the hearing was about as certain as it was possible to present. It was shown that $245,602.40 had been expended up to the date of the hearing; most of the rights of way had been obtained; 2.25 miles of the ditch for which claim was made had been constructed, including meas-

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uring of flumes and diversion dams; construction of 3.9 miles of ditch in the southeast corner of North Park was completed, concrete indications of a present and completed intention to take. Surveys were made to determine the future water needs of persons living in the Four Counties area, showing that on projected population growth 395,000 persons would be living within the proposed Four Counties to be served by the year 1970 and 740,000 by 1985. It was estimated that 1,145,000 people would be in the area by the year 2000. This would create demands for additional water of from 35,000 to 45,000 acre feet by the year 1970; from 85,000 to 146,000 acre feet by the year 1985; and between 156,000 and 268,000 acre feet by the year 2000. In view of the fact that waters from the natural streams in the area are virtually 100% appropriated, the only source of water available would be from a transmountain diversion project such as here presented.

[8] Aware of the problems presented in projects of such magnitude and that their solution is not always resolved in detail either from the outset or at the time of the hearing for a conditional decree, we further said in the *Metropolitan* case:

"* * * The conditional decree statute is designed to meet the very problems confronting the Association, and it should be construed and applied so as to aid and encourage, rather than to block development and early use of the water resources of the state."

Fourth Question To Be Determined:

DID THE COURT ERR IN FINDING AND CONCLUDING THAT THERE WERE CHANGES IN THE PLAN OF SUCH NATURE AS TO INDICATE NO FIXED INTENTION TO TAKE OF IF THERE WAS SUCH AN INTENTION IT HAD BEEN ABANDONED?

[9] This question is answered in the affirmative.

There is nothing in the evidence that would support a finding of abandonment. Of the changes referred to, all but one involved amendments to the storage and transmission system first envisioned by Four Counties. A change of diversion is not involved. Evidence such as shown herein could not form the basis for abandonment of claimant's intention to take water from a particular source. If a contemplated or actual diversion of water is not altered at its source, the doctrine of relation back should apply.

Apparently relying on some of the language in City and County of Denver v. Northern Colorado Conservancy District, 130 Colo. 375, 276 P.2d 992, the court also concluded that the abandonment of headgates on ditch No. 1 and an increase in the take from headgates on ditch No. 3 constituted such a major change in plans that the initiation of the appropriation could not relate back to the first step taken, i. e., the survey. The court thus advanced this as another reason for adopting the January 26, 1959 date as the first date from which "due diligence had been shown."

The alterations in the plans on subsequent maps filed did not change the source from which the water was to be taken nor the amount claimed. It was effected in such a short period of time as to be not a change at all. In fact, the evidence was that the only revision in the maps and statements originally filed with the State Engineer was made because further engineering studies showed that it was more efficient to transport the waters for which claim was made by gravity to a single reservoir than to transport the waters to North Park at two places. The revision claimed no new water and changed no point of diversion. It does, however, result in several points of diversion not being used. The differences actually result in a more efficient, economical plan; and rather than showing no fixed intention to take, they demonstrate continuous engineering studies with a purposeful, deliberate and diligent effort to take all steps necessary to divert the water

and apply it to beneficial use. On the evidence here presented, what was said by Mr. Justice Moore in his dissenting opinion in City and County of Denver v. Northern Colorado District, supra, applies to these facts and not the language in the majority

opinion. The dissent discussed the following ruling:

"As will be seen * * * there are some changes which can be made in the plan of a water development which will not constitute a relinquishment of the project. One criterion for determination of this problem was used by the United States Supreme Court in the case of State of Wyoming v. [State of] Colorado, 259 U.S. 419, 42 S.Ct. 552, 66 L.Ed. 999, where the changes planned had to do with the determination of 'whether' the would-be appropriator would proceed at all with the diversion project. Such changes are to be distinguished from those which go rather to selection of the most economical or effective means to be employed for the accomplishment of a diversion and use of water, concerning which there already is a fixed and definite intention to take. Once the decision has been made to proceed with the project, continuing investigations and changes are simply evidence of diligence and endeavor to accomplish the greatest good at a minimum of cost to the public, not abandonment of the project."

Fifth Question To Be Determined:

IS THE ECONOMIC FEASIBILITY OF COMPLETING THE PROJECT A TEST TO BE APPLIED UPON APPLICATION FOR A CONDITIONAL DECREE?

[10] This question is answered in the negative.

As has been indicated earlier, the purpose of the conditional decree statute is to determine if an appropriation has been initiated. The requirement that the parties appear before the court under C.R.S.1963, 148–10–8, to report on the diligence pursued and the additional steps taken is designed to enable the court to check on whether evidence of insufficient finances or the economic non-feasibility of the project appear in more concrete form.

One cannot reasonably expect a water diversion plan of this size to be without problems and difficulties. Claimant is under an obligation to exert reasonable diligence to overcome these obstacles or lose his claim. At each of the statutory reviews of the prosecution of the claim, there will have to be presented progress reports of financial plans and sufficient work to prove that the project can and will be completed. As we said again in the *Metropolitan* case, "If they have miscalculated and fail, the loss is theirs—if they succeed, it will be for the eternal benefit of the peoples of the state of Colorado."

The judgment is reversed and the cause remanded with directions to enter a conditional decree in accordance with the claim filed and prayed for.

FOUR COUNTIES WATER USERS ASSOCIATION, Plaintiff in Error,

v.

COLORADO RIVER WATER CONSERVATION DISTRICT and Middle Park Water Conservancy District, Defendants in Error.

No. 20942.

Supreme Court of Colorado.

En Banc.

April 11, 1966.

Rehearing Denied June 6, 1966.

Water adjudication proceedings in the District Court, Grand County, Addison M. Gooding, J., which was stayed pending the determination of a similar case in another

court. Judgment was entered in that case and appeal was taken. The Supreme Court, Day, J., held that court correctly overruled a motion that it disregard testimony in simi-

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lar case in another county which had been made part of the record on grounds that transcript of proceedings in other case was not filed within time permitted by rule, where such transcript was only an exhibit in the case before the court and was not required to be filed within such period.

Reversed with directions.

See also Colo., 414 P.2d 469.

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Court correctly overruled a motion that it disregard testimony in similar case in another county which had been made part of the record on grounds that transcript of proceedings in other case was not filed within time permitted by rule where such transcript was only an exhibit in the case before the court and was not required to be filed within such period Rules of Civil Procedure, rule 112.

Ireland, Stapleton, Pryor & Holmes, D. Monte Pascoe, Denver, for plaintiff in error.

Kenneth Balcomb, Glenwood Springs, for defendant in error Middle Park Water Conservancy Dist.

Frank Delaney, Glenwood Springs, Barnard & Barnard, Granby, for defendant in error Colorado River Water Conservation Dist.

DAY, Justice.

This is a companion case to Colo., 414 P.2d 469, Supreme Court Docket No. 20943 decided this date.

The plaintiff in error, Four Counties Water Users Association, made a statement of claims for water from Water District 50 in the district court for the County of Grand. Defendant in error, Middle Park Water Conservancy District, filed a written protest thereto, and defendant in error Colorado River Water Conservation District, although not filing such written protest, joined in the objections at the hearing held in the matter.

At the conclusion of the hearing, the trial court took cognizance of the proceedings in Civil Action 3538 in Routt County involving claims for other features of the Four Counties system and announced:

"* * * ruling will be reserved until the conclusion of the hearing at Steamboat Springs next month.

* * * * * *

"At which time counsel will be at liberty to argue all the questions which are involved in this claim and in the Routt County claim because it is quite evident to me that the two are connected in such a manner that each is more or less contingent upon the other. At all events the considerations common to both claims will constitute a large part of the issues between the parties."

Subsequent to the hearing in the Routt County case, identical and consolidated judgments were entered in both this and the Routt County case—denying the claims of plaintiffs in error in their entirety.

Counsel for the defendants in error argue that since no stipulation was made to the

effect that the proceedings in the Routt County case were to be made a part of this case (although it is admitted that a stipulation was made in the Routt case that the testimony herein should be considered there) we are required to disregard the testimony from the Routt County case which has been made a part of the record. Defendants in error further contend that it should be disregarded because the transcript of the proceedings of the Routt County case was not filed herein within the time permitted under Rule 112, R.C.P. Colo., and so is not properly certified. The trial court overruled a motion going to this latter point, stating that this Routt County transcript was only an exhibit in the case before us so was not required to be filed within the time permitted by the rule. The court did not abuse its discretion in handling the two cases as was done. In this court the cases were consolidated for

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argument, further indicating the interrelation of the two.

For the reasons given in Colo., 414 P.2d 469, Supreme Court Docket No. 20943, the trial court erred in denying Four Counties claim. Therefore, the judgment of the district court of Grand County denying the conditional decree is reversed and the court is directed to enter a conditional decree in accordance with the prayer of the claimant.